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Report on

The Making and Revocation of Wills

LAW REFORM
COMMISSION OF
BRITISH COLUMBIA

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LAW REFORM COMMISSION OF BRITISH COLUMBIA

REPORT ON THE MAKING AND REVOCATION OF WILLS

LRC 52

September, 1981

The Law Reform Commission of British Columbia was established by the *Law Reform Commission Act* in 1969 and began functioning in 1970.

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Canadian Cataloguing in Publication Data

Main entry under title:
Report on the making and revocation of wills

"LRC 52".
Includes bibliographical references.
ISBN 0-7718-8283-1

1. Wills - British Columbia. I. Law Reform Commission of British Columbia.

KEB245.A72L38 346.711'05'4 C82-092000-2

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TO THE HONOURABLE ALLAN WILLIAMS, Q.C.,
ATTORNEY GENERAL OF THE PROVINCE OF BRITISH COLUMBIA:

The Law Reform Commission of British Columbia has the honour to present the following:

REPORT ON THE MAKING AND REVOCATION OF WILLS

In 1978, the Commission added the law of succession to its programme. We recognized from the start that this was an ambitious undertaking, and that it would be necessary to divide the topic into a number of discrete projects. This Report is the first of a series which will examine the law governing the devolution of property on death. Other Reports will address the Interpretation of Wills, The Effect of Testamentary Instruments, Statutory Succession Rights, and Probate Procedure and Administration.

In this Report we examine the formalities imposed by statute on the making of testamentary instruments. Our examination is not restricted to wills. In recent years, registered retirement savings plans, registered home ownership savings plans, employee benefit plans, and insurance policies have become increasingly signficant. In many cases, money held in such plans forms a large part of a testator's assets.

This Report explores a number of issues of concern to a person contemplating the execution of a will, and to a Court of Probate called upon to determine its validity. These issues include the capacity of minors, soldiers' and mariners' wills, the international form of will, the effect of wills improperly executed, the capacity of witnesses, the designation of beneficiaries under various plans, and the formal validity of wills which violate a foreign law made relevant by British Columbia choice of law rules. The Commission has made recommendations concerning all these matters.

FOREWORD

In 1978, the Commission added a study of British Columbia succession law to its programme. A study of the law respecting the devolution of property on death is inevitably a long and complex undertaking. Recent innovations in British Columbia concerning matrimonial property rights have added to the complexity of such a task. Although we are aware of the dangers inherent in attempting to deal with any one area of succession law as a discrete topic, it is the only approach that is, realistically, open to us. We think it appropriate, therefore, to outline briefly our approach to this major study.

This Report concerns those matters which would generally concern a court of probate. The question of whether a will is validly made is sometimes a difficult one, and our research has led us to conclude that some relaxation of the rules respecting the making of wills is in order. Similarly, it is possible that a testator's attempt to revoke his will may fail, even though a reasonable person having regard to the evidence would be convinced beyond all doubt that the testator no longer intended his will to be effective. We also make recommendations in this Report designed to permit courts to be more flexible in considering the evidence supporting a contention that a will was revoked or altered.

We also make recommendations in this Report proposing changes in the law respecting witnesses, conflicts of law and the capacity of minors to make wills. In addition, we discuss the problems posed by interests in insurance policies, employee benefit plans and similar schemes under which a participant has the right to designate a beneficiary to take on his death. It appears that the law respecting such designations is neither uniform nor easily accessible.

In a subsequent Report, we plan to consider the rules governing the interpretation of wills. Insofar as our recommendations in this Report will have the effect of rendering informal documents admissible to probate, we think it important to assess the common law and statutory rules employed by courts to determine the meaning of the words used by a testator. In a further Report, we shall examine the rules of law which govern the effect of a testamentary instrument. For example, if a testator devises Blackacre to his son, and for one reason or another the son disclaims the gift, what should happen to the property? What should the son do to effectively disclaim the gift?

Not all property passes under a will. If a person dies intestate, rights to his estate are determined by the *Estate Administration Act*.[1] Even where a person makes a will, its terms may be altered by a court exercising its jurisdiction under the *Wills Variation Act*.[2] The impact of both these Acts must be reassessed in the light of rights to family assets conferred by the *Family Relations Act*.[3] Should the death of a spouse vest an interest in family assets in the surviving spouse? Should such an interest vest notwithstanding the terms of a will or the *Estate Administration Act*? We shall examine the question of statutory succession rights in a later Report.

Once our review of the substantive law governing the devolution of property upon death is complete, we intend to examine the law governing the probate of wills and the granting of letters of administration, as well as the rules governing the administration of estates. In particular, we shall examine the procedural implications of our substantive recommendations. For example, in this Report we recommend the adoption of a type of informal will. Should such a will be probated only in solemn form, or should informal wills meeting certain criteria be probated in common form?

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[1] R.S.B.C. 1979 c. 114.

[2] R.S.B.C. 1979 c. 435.

[3] R.S.B.C. 1979 c. 121.

In formulating our recommendations, we have pursued four major goals:

(1) the modernization of enactments and procedures to enable testators to dispose of their property on death without unnecessarily complicated formalities;

(2) the simplification of the tasks of personal representatives and their legal advisers with a view to reducing costs to a deceased's estate;

(3) uniformity of succession legislation with other provinces where possible; and

(4) the consolidation and rationalization of the legislative framework, for the convenience of both the public and the legal profession.

We recognize that these goals are not necessarily compatible. A recommendation which makes it easier for courts to give effect to testamentary intent may render the task of legal advisers more difficult. Our aim is to achieve an appropriate balance among the competing policies at stake.

This Report is based on our Working Paper No. 28, entitled The Making and Revocation of Wills. In that Working Paper we canvassed most of the issues discussed in this Report. We received a number of helpful submissions in response to that Working Paper, and we shall refer to them from time to time in this Report.

CHAPTER I

INTRODUCTION

A. Historical Introduction

Before 1540 the law of succession in England consisted of rules which had evolved from earlier tribal and local customs.[1] No legislation regulated the manner in which wills were made or interpreted. Courts of Chancery, ecclesiastical courts and common law courts not only exercised competing jurisdictions in respect of testamentary dispositions, but also applied different legal rules.[2]

In fact, under English law testators have not always enjoyed an untrammeled freedom of testation. During the twelfth and thirteenth centuries, the law required that the estate of a deceased person be divided into three parts. One-third of the estate was reserved for the widow, one-third for the children, and the remaining third could be disposed of by will, usually for pious or charitable purposes. Making a will eventually became common for those who could afford to do so, and intestacy was regarded as disgraceful. It implied that the deceased was unshriven, i.e. without final confession.[3]

The *Statute of Wills, 1540* introduced mandatory formalities into the law for the first time.[4] It required that a will disposing of real property be in writing, although it did not require that it be signed.[5] In the next century, further requirements were introduced by the *Statute of Frauds, 1677* to govern the form of a will disposing of land. It provided in part:[6]

> . . . all devises . . . , shall be in writing, and signed by the party so devising the same, or by some other person in his presence and by his express directions, and shall be attested and subscribed in the presence of the said devisor by three or four credible witnesses, or else they shall be utterly void and of none effect.

The statute did not, however, require that a will disposing of personalty be in writing. Such wills were nevertheless usually reduced to writing due to the stringent formalities required to validate oral wills disposing of property of a value of over £30.[7]

During the period between the enactment of the *Statute of Frauds* and the early part of the 19th century complex rules developed respecting the form and execution of wills. There were nominally six separate types of wills, whose classification depended on the nature of the asset devised or bequeathed. Within each class sub-rules were formulated which further confused the law.[8] As a result of the complex and uncertain nature of these rules, frequent litigation was inevitable. The situation was exacerbated by the development of complex rules concerning the construction of language in wills. Ultimately lawsuits over wills became the most frequent source of real property litigation.

In order to reduce the problems associated with doubtful titles to land, the Real Property Commissioners in England undertook to examine the law governing the making of wills.[9] In their Fourth Report, issued in 1833, they made sweeping and radical proposals for reform.[10] They concluded that all wills should be required to be executed in one simple form which could be easily understood and applied. After surveying the advantages and disadvantages of the various forms commonly used, they recommended that the formalities set out in the *Statute of Frauds* should be required for all wills.[11]

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[1] Holdsworth, 3 History of English Law 435.

[2] *Ibid.*

[3] *Ibid.* at 555.

[4] *The Act of Wills, Wards and Primer Seisins* 32 Henry VIII, c. 1, which was enacted partly as a result of a compromise with landowners with whom Henry VIII had come into conflict over the *Statute of Uses* (1535-6) 27 Henry VIII, c. 10.

[5] In *Stephens* v. *Gerrard*, 2 Keble 128, 84 E.R. 81, a will was upheld although it was written on pieces of paper and had merely been dictated by the testator, who said he would "sign it later". The testator had in fact neglected to sign or publish it, but the will was nevertheless admitted to probate.

[6] The *Statute of Frauds*, 1677, 29 Car. II, c. 3, s. 5. See M.M. MacIntyre, *Case and Comment, Wills—Formalities of Execution* (1932) 10 Can B. Rev. 253. He notes that these "legislative precepts fell for interpretation upon the fertile soil of our common law technique in the days when it was rich in the elements of judicial legislation and produced a luxuriant growth of the precepts of precedent."

[7] The *Statute of Frauds*, supra n. 6, ss. 19 and 20.

[8] *See* De Villiers J., Real and Personal Property in England, Cambridge University Press at 106.

The recommendations of the Real Property Commissioners were implemented by the *Wills Act, 1837*. The formalities required for a valid will were specified in one section[12] which has not only been in effect since that date in England, but has served as the model for the Wills Acts of most common law jurisdictions. The Commissioners accomplished their main objective, and litigation over wills disposing of real property was reduced. However, their second objective of producing a simple set of formalities, understandable by all, proved to be a more elusive goal. Testators and their witnesses often experience difficulty in complying with the requirements of the *Wills Act*. One Australian author recently commented:[13]

> Faced with the difficult task of writing out the provisions of their will, signing their name just below the final word of these provisions in the presence of two persons, and then remaining in the room while these same two persons add their own signatures, would-be testators have contrived a myriad of variations. Testators have restlessly wandered their houses while witnesses have signed. Witnesses have come and gone like the ebb and flow of the tide. Attestation clauses have travelled north, south, east and west across the page. Weird and mysterious scratchings have appeared in the place of signatures. Codes have been employed, no doubt for fear the will may fall into enemy hands. Egg-shells have proved almost more popular than paper.

Despite these problems, the *Wills Act, 1837* has survived with only minor modifications[14] in most jurisdictions for 144 years. It is only recently that attention has been directed to some of its outdated provisions.

The English *Wills Act, 1837* was received law in British Columbia, and remained unchanged until 1960. In that year it was replaced with a revised version based on a draft prepared by the Uniform Law Conference of Canada.[15] In this revision[16] the execution requirements for a will remained essentially those of the English statute.[17]

B. Succession Law Reform in Other Jurisdictions

Although the statutory requirements for making a will have changed little over the past 144 years, major changes have occurred in our society. The introduction of deferred income plans and the increasing importance of life insurance, as well as the material wealth of our society, have shifted attention away from the devolution of real property, where it rested in previous centuries. The introduction of family property legislation in British Columbia[18] has also introduced new complexity into the law.

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[9] Fourth Report of the Real Property Commissioners, 1833.

[10] The report contained fifty-eight "propositions."

[11] *Supra* n. 9 at 14. Exceptions were permitted for soldiers, sailors and mariners. These "privileged" wills are discussed in Chapter II.

[12] The *Wills Act, 1837*, 1 Vic., c. 26, s. 9, which provided:

> . . . no will shall be valid unless it shall be in writing and executed in manner hereinafter mentioned (that is to say) it shall be signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction, and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary.

[13] Palk, Simon, *Informal Wills: From Soldiers to Citizens* (1975) The Adel. B. Rev. 382.

[14] E.g. the *Wills Act Amendment Act*, 1852 (U.K.) provided for alternate locations where a signature could be placed.

[15] At that time the name of the Conference was the Commissioners on Uniformity of Legislation in Canada.

[16] The *Wills Act*, R.S.B.C. 1960, c. 408.

[17] *Ibid*. ss. 5, 6 and 7.

[18] The *Family Relations Act*, R.S.B.C. 1979, c. 121.

Other agencies in Canada have reviewed the rules governing succession inherited from England and France. Since the first meeting of the Commissioners on Uniformity of Legislation in Canada in 1918, the subject of wills legislation has had a high priority. Several versions of a Uniform Wills Act have been promulgated since that time, and the uniform statute has been adopted in several common law provinces.[19] Law Reform agencies in Ontario, Manitoba and Alberta[20] have examined aspects of succession law. Recent amendments have been enacted in all three Provinces.[21] The Law Reform Commission of Manitoba recently recommended the enactment of a provision under which Manitoba courts are given a discretion to admit a document to probate notwithstanding that it does not comply with the formalities specified by the Manitoba *Wills Act*.[22] In the Province of Quebec, the Civil Code Revision Office has completed a major study[23] of the succession law of that Province, and has issued a report recommending many changes to modernize their law and procedures.[24] At the international level, a number of conventions and agreements have been drafted and ratified, particularly in the past decade, with the goal of promoting uniformity.

In England, the Law Reform Committee recently released its 22nd report, also entitled *The Making and Revocation of Wills*.[25] That report examines many of the issues canvassed in our Working Paper and in this Report, and we shall examine the Law Reform Committee's recommendations elsewhere in this Report.

Succession law reform has been the subject of considerable attention by Australian law reform agencies. The South Australia Law Reform Committee has reported on the reform of the law of intestacy, wills and family provision.[26] In New South Wales, the Law Reform Commission recently examined family provision legislation,[27] and in Western Australia, several reports have been issued concerning intestacy, dependant's relief and succession.[28] In Queensland, an extensive examination of the law of wills was completed recently.[29] Their final report will likely be released in the near future.

In the United States, all 50 States have jurisdiction to enact succession laws. A survey of the year 1977 noted that some 46 States passed significant trust, estate and probate-related legislation.[30] In addition, the Model Probate Code, originally prepared in 1946,[31] has formed the basis for subsequent work by the National Conference of Commissioners on Uniform State Laws, which promulgated a new Uniform Probate Code in 1969. While the Code has not been adopted verbatim in every enacting State,[32] it has accomplished one of its major goals in bringing together substantive and procedural law in one model statute.[33]

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[19] The Uniform Wills Act has been adopted in seven jurisdictions in Canada, although its more recent revisions have only been incorporated into Ontario and Manitoba legislation.

[20] *See* the Ontario Law Reform Commission Report on the Proposed Adoption in Ontario of the Uniform Wills Act (1968) and Report on the Convention on the Form of an International Will (1974). In Alberta the Institute of Law Research and Reform recently issued a Report on Family Relief Legislation (1978) and in Manitoba, the Law Reform Commission published a Report on the International Form of Wills for Manitobans (1974).

[21] In Ontario *The Succession Law Reform Act*, S.O. 1977, c. 40 was a major consolidation of succession laws. In Alberta and Manitoba recent legislation has incorporated the International Form of Will into their respective Wills Acts.

[22] *See* Report on "The Wills Act" and the Doctrine of Substantial Compliance, 1981.

[23] Quebec Civil Code Revision Office Report on Succession, 1976.

[24] Quebec Civil Code Revision Office, Report on the Quebec Civil Code (1977) Vol. I & II and *see* Draft Civil Code (Book III Succession).

[25] May 1980, Cmnd. 7902.

[26] Report of the Law Reform Committee of South Australia, Relating to the Reform of the Law on Intestacy and Wills (No. 28, 1974); and Report on the *Testator's Family Maintenance Act, 1918-1943* (No. 3, 1969).

[27] Law Reform Commission of New South Wales, Report on *The Testator's Family Maintenance and Guardianship of Infants Act, 1916*, (No. 28, 1977).

[28] Western Australia Law Reform Commission Reports on: The Protection to be given to the Family and Dependants of a Deceased Person (No. 2, 1970); Illegitimate Succession (No. 13); Distribution on an Intestacy and Administration of Insolvent Estates.

[29] Queensland Law Reform Commission, Working Paper on a Bill to Consolidate and Amend the Law of Succession and the Administration of Estates (1975).

[30] Report of the Committee on Significant Curent Legislation, Probate and Trust Division, *1977 Legislation Affecting Trusts and Estates*, (1978) 13 Real Prop. Prob. & Tr. J. 138.

[31] The Model Probate Code was drafted by an American Bar Association Committee in 1946, and was subsequently the subject of much praise and criticism. *See, e.g.* Mechem, Philip, *Why Not a Modern Wills Act?*, (1948) 33 Iowa L. Rev. 501 *and* Niles, *Model Probate Code and Monographs on Probate Law: A Review* (1947) 45 Mich. L. Rev. 321.

Although the main emphasis of the Uniform Probate Code is on procedural law, it does contain detailed provisions concerning the requisite formalities for wills. Unfortunately, studies of the Code's operation and effect to date have concentrated on the streamlined procedures available under it, not on amendments to the substantive law relating to the form of wills.[34]

C. Subjects Discussed in This Report

In this Report we will examine the proposals for reform outlined above, and others, as models for possible amendments to our *Wills Act*. We start with the question of the capacity of minors to make wills, and then proceed to consider what forms of wills should be regarded as valid. We also consider whether a testamentary document should be admitted to probate if the necessary formalities are not observed. The manner of altering or revoking wills is then examined, as well as the rules concerning witnesses to wills and the effect of testamentary gifts to such witnesses.

In recent decades, deferred income plans, such as retirement savings plans, have become popular. In addition, many employment pension plans have a type of death benefit attached to them. Such assets often form the major portion of a testator's assets, and may often be disposed of separately from his will by means of a designation. In view of the increasing importance of this form of inheritable wealth, we will examine the formalities which should attend such designations.

With the increased mobility of our population, it is likely that conflict of laws problems will become more important in the future. This paper includes a review of the choice of law rules applicable to wills.

Finally, we consider the options available to a testator once he has made his will regarding deposit of the document or the registration of particulars of its location. In British Columbia we have a registration system that appears to be unique in the common law world.

At the end of the Report several appendices are attached. Copies of our present *Wills Act*, as well as the *Uniform Wills Act*, are included. Other appendices contain the text of international agreements.

D. Terminology

As several different forms of will are discussed in this Report, in addition to the Wills Acts of a number of jurisdictions, a brief note on the terminology employed in this Report is appropriate.

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[32] The Uniform Probate Code was promulgated in 1969 and amended in 1975. The Code, as drafted, has been adopted by Alaska, Arizona, Idaho, North Dakota, Nebraska, South Dakota, and Utah. Colorado and Florida have adopted the Code with substantial modifications. New Mexico adopted the Code with extensive amendments effective July 1, 1976. Minnesota adopted parts of the Code while Montana adopted the Code with minor changes. New Jersey did not adopt the Code, as such, but enacted legislation similar to the Code provisions.

[33] The long title to the Code indicates its goals. It provides in part:

> An Act . . . consolidating and revising aspects of the law relating to wills and intestacy and the administration and distribution of estates of decedents, missing persons, protected persons, minors, incapacitated persons and certain others; ordering the powers and procedures of the Court concerned with the affairs of decedents and certain others; providing for the validity and effect of certain non-testamentary transfers, contracts and deposits which relate to death and appear to have testamentary effect; . . . making uniform the law with respect to decedents and certain others; and repealing inconsistent legislation.

[34] *See, e.g.*, Terry Crapo, *The Uniform Probate Code—Does it Really Work?* (1976) Brig. Young U.L. Rev. 395.

The Wills Act: This term refers to the present *Wills Act* of British Columbia. It is set out in Appendix A.

The Wills Act, 1837: This English statute was enacted in response to the 4th Report of the Real Property Commissioners, published in 1833. Since the law of British Columbia, as well as that of many other common law jurisdictions, is based on the *Wills Act, 1837*, reference is made to it as such throughout this Report.

The Uniform Wills Act: The Uniform Law Conference of Canada has promulgated a uniform statute suitable for adoption by the common law provinces in Canada. It is in four parts and is referred to as the *Uniform Wills Act*. It is set out in Appendix B.

The International Convention: "The Convention Providing a Uniform Law on the Form of an International Will" was the product of the Diplomatic Conference on Wills held in Washington, D.C. in 1973. It is referred to in this Report as the International Will Convention and is set out in Appendix C.

The Uniform International Wills Law: This term is used to describe the Uniform Law on the Form of an International Will which, *inter alia*, sets out the execution requirements for international wills. It forms an Annex to the International Will Convention and is set out in Appendix D.

International Will: This term designates a form of will sanctioned by the Uniform International Wills Law.

Holograph Will: This term is commonly used to describe a will in which a testator disposes of his estate by an unwitnessed document written in his own hand.

Privileged Will: In certain circumstances, the *Wills Act* permits members of certain Armed Forces and mariners or seamen at sea to execute an unwitnessed will. This special form is usually referred to as a privileged will. Although the *Wills Act* provides a complex formula to ascertain precisely who is entitled to this privilege, in the interest of brevity we shall refer to persons entitled to execute a privileged will as "military personnel and mariners."

Informal Will: "Informal will" is a term describing testamentary instruments which do not conform to the traditional formalities required by the *Wills Act*. Holograph wills are a type of informal will.

CHAPTER II TESTAMENTARY CAPACITY OF MINORS

A. Who May Make a Will?

Prior to 1837, wills disposing of leasehold and personal property could be made by boys of fourteen and girls of twelve years of age, but in general a person could not dispose of real property by will until the age of 21. In their 1833 Report, the Real Property Commissioners recommended that no person under the age of 21 years should be capable of making a will.

In British Columbia anyone who has reached the age of 19 and is of sound mind has testamentary capacity.[1] There are exceptions to this rule: individuals who are military personnel or mariners, or who are married,[2] may make a will although under 19. In Canada, the age at which a person acquires capacity is not uniform. The most common age of majority specified in provincial legislation is 18. In Newfoundland, however, a testator need only be 17.[3] In Quebec, the Civil Code Revision Office has proposed that a 16 year old be permitted to dispose of his property by will in the authentic (or notarial) form.[4]

Should the minimum age for general testamentary capacity remain at 19 in British Columbia? Although consistency with other British Columbia minimum age requirements is desirable, if the age were lowered to that at which a person could enlist in the Armed Forces it would eliminate the need for a major exception to the rule that testamentary capacity is required at the age of 19. At the present time, a person may enlist in the Canadian Forces at age 18.[5] However, a person under 18 may enlist if he has his parents' consent. If the general testamentary age limit were lowered to 18, an exception would still be required for those who enlist at an earlier age. Similarly, a reduction to 18 would not obviate the necessity for an exception in respect of married persons. A person as young as 16 may marry with his parents' consent, or at an earlier age where the court so authorizes.[6]

We are of the opinion that as a general rule the age of majority in the Province should be the minimum age at which wills may be made. It is at this age that an individual is generally considered to be sufficiently mature to understand his obligations to other people. Although the age of 19 specified by the current *Wills Act* in section 7(1) is the same as that specified in the *Age of Majority Act*,[7] we nevertheless are of the view that the reference to a specific age should be replaced by a reference to the "age of majority." In this manner, changes in the age of majority will automatically be reflected in the *Wills Act*.

The Commission recommends that:

1. Section 7 of the Wills Act *be amended by deleting "is under the age of 19 years" and substituting "is under the age of majority."*

B. Exceptions to the Minimum Age

1. APPLICATIONS FOR CAPACITY

(a) Generally

There are undoubtedly situations in which a minor would benefit from having the capacity to make a will, but the law provides no machinery by which the minor may acquire such capacity. A similar issue arose in our

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[1] Feeney, T., The Canadian Law of Wills: Probate, 24.

[2] *Wills Act*, R.S.B.C. 1979, c. 434, ss. 7 (1) (a) and 7 (3).

[3] R.S.N. 1970, c. 401, s. 3.

[4] Report on the Quebec Civil Code, Quebec Civil Code Revision Office, Book III, Title Three, Art. 248 (1977).

[5] *National Defence Act*, R.S.C. 1970, c. N-4, s. 20 (3).

[6] *Marriage Act*, R.S.B.C. 1979, c. 251, s. 24 (1), s. 25 (2).

[7] R.S.B.C. 1979, c. 5, s. 1.

Report on Minors' Contracts,[8] in which we examined the question of minors' capacity to enter into contracts. It was recommended that a minor should be able to apply for contractual capacity either generally, or in respect of a specific contract when the protection offered by the law to minors would be unnecessary in the circumstances.[9]

In New Zealand a similar scheme has been in operation in respect of wills since 1903. Under the *Life Assurance Policies Act Amendment Act* enacted in that year, a minor 15 years of age or older was declared competent, with the consent of the Public Trustee, to dispose by will of any interest he might have in a policy of insurance on his own life. This conditional grant of capacity does not appear to have caused undue problems in New Zealand, and it has been noted that the vast majority of proposals presented to the Public Trustee were sensible and reasonable dispositions of the proceeds of life insurance policies. As a result, the Public Trustee's consent has rarely been withheld.[10]

In 1969, this concept was extended to embrace wills disposing of different types of property. Section 2 of the *Act to Amend the Law Relating to Wills*[11] provides:

> **2. Wills of minors**—(1) Every minor after his or her marriage or on or after attaining the age of 18 years shall be competent to make a valid will or revoke a will in all respects as if he or she were of full age.
>
> (2) Every minor who is of or over the age of 16 years, but has never been married and has not attained the age of 18 years, may, with the approval of the Public Trustee or of a Magistrate's Court, make a will or revoke a will, and every will so made and every revocation so effected shall be valid and effective as if he or she were of full age.
>
> (3) The approval required by subsection (2) of this section shall be given if the Public Trustee or the Court is satisfied that the minor understands the effect of the will or the revocation, as the case may be.
>
> (4) Except as provided in section 6 of the Wills Amendment Act 1955 or in subsection (1) or subsection (2) of this section, no will made, and no revocation of a will effected, by a person under the age of 18 years shall be valid or effective.

In the Working Paper that preceded this Report, we made the following proposal:

> 2. The Supreme Court of British Columbia have the power, upon application, to grant a minor a general testamentary capacity as if he were of full age.

There are obvious differences in approach between the New Zealand Act and that proposal. In addition, comments we received from our correspondents respecting the proposal were mixed. We therefore think it appropriate to address separately each of the concerns identified by our correspondents.

(b) Would the Proposal be Useful?

Our correspondents were equally divided on this question. Nevertheless, we are not persuaded that the proposal is without merit. We therefore adhere to our original conclusion that in certain cases arbitrarily fixing the age of majority as the age at which every person may make a will could work an injustice. While many minors are undoubtedly immature, others may be as capable of exercising mature judgment at 16 as they will be at 19. Where for some reason the execution of a will by a minor is desirable, we do not believe that an individual capable of comprehending his moral obligations, the extent of his estate, and the legal consequences of his acts should be precluded from executing a valid will solely because he is under age. The age of majority should be no more than a *prima facie* requirement, which may be displaced by appropriate evidence. This conclusion is buttressed by the apparent success of a similar scheme in New Zealand.

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[8] Law Reform Commission of British Columbia, Report on Minor's Contracts (LRC 26, 1976).

[9] *Ibid.* at 42.

[10] *See* G.P. Barton, *Wills Amendment Act 1969*, (1970) 4 N.Z.U.L. Rev. 78 at 80.

[11] 1969, No. 40 (N.Z.).

(c) Should the Minor be Required to Obtain Approval?

It might be argued that if an age requirement works an injustice, the solution is merely to repeal it, and to judge each case on its merits. However, we are not convinced that the general rule is completely without merit. The alternative is probably litigation whenever a minor draws a will. In general, we have no quarrel with the view that in many cases a minor will not in fact be competent. We think it appropriate therefore that the capacity of a minor be determined before he makes a will. We are in accord with the New Zealand legislation insofar as it specifies that a minor who desires to execute a will should obtain approval in advance.

(d) Who Should Approve the Execution of a Will?

In Working Paper No. 28, we proposed that the power to approve the execution of a will should be vested in the Supreme Court. As one of our correspondents pointed out, most residents of British Columbia enjoy relatively easy access to judges or local judges of the Supreme Court. While it is possible to grant a similar power to the Public Trustee, the centralization of that office's functions in Vancouver renders that option less attractive than it might otherwise be. Moreover, vesting the power to make such orders in a Supreme Court judge will be advantageous when the recommendations made in our Report on Minor's Contracts[12] are implemented. In that Report we recommended that the Supreme Court of British Columbia be given a power to confer a general contractual capacity on minors. Such an application might usefully be combined with an application for capacity to make a will.

The major argument advanced against conferring such a power on the court is the difficulty of securing an impartial guardian *ad litem*. In the Working Paper, we expressed the view that the present Rules of Court were sufficiently flexible to ensure that a guardian *ad litem* could be found.[13] The only general qualification is residence in the province. We adhere to this conclusion.

(e) Should a Specific Will be Authorized?

The New Zealand legislation enables the appropriate authority to authorize "a will" or the revocation of "a will." Only a will so approved is effective. The minor is not granted a general testamentary capacity, and hence regardless of any change in his wishes or in his circumstances, a revocation without the appropriate consent is ineffective.

In the Working Paper we canvassed a number of objections to such a limited scheme. The court might be inhibited in its task of considering whether to approve a specific form of will if such an approval could be construed as a determination that the actual words used in the will are effective to carry out the minor's intent. That task is more appropriately that of a court of construction and the minor's legal advisers. The inquiry would of necessity go beyond the relatively simple issue of whether the minor is sufficiently mature and capable of recognizing the extent of his property and his legal and moral obligations. Instead the court would be forced to undertake an investigation into the merits of the will itself, a task which could involve wide-ranging inquiries into family relations, the minor's motives, the legal and financial position of possible beneficiaries, and the tax implications of certain dispositions.

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[12] L.R.C. 26, Feb. 24, 1976.

[13] *See* Working Paper No. 28, at 15.

Moreover, and apart from practical considerations, we are not convinced that it is necessary to restrict the court to approving a specific will. No such limitations are placed on adult testators. If the bar of minority is justified on the basis of immaturity, it seems unfair to continue to impose restrictions when a minor has been specifically found to be capable of exercising mature judgment. This is particularly so in respect of the revocation of wills. We think that a mature and capable minor should be able to revoke a will he deems unsatisfactory. There is little to commend a scheme of involuntary testation. We are fortified in this conclusion by the fact that those of our correspondents who favoured proposal 2 in our Working Paper did not take issue with the tentative conclusion that a general, and not a limited testamentary capacity should be conferred upon minors in appropriate cases.

2. MARRIAGE

In British Columbia a person who is, or has been, married may make and revoke a will while under the age of 19. The rationale for this exception is that the distribution of a minor's estate should not be governed solely by the intestate succession rules where he has undertaken the responsibilities inherent in marriage. After his marriage there may be a wider range of potential beneficiaries having moral claims on the minor. He may believe that his spouse should be entitled to a larger share than the rules respecting intestate succession allow. A married minor should be free to recognize these claims by making a will. We are in agreement with the policy of the Act and therefore do not propose any amendment to the exception for married persons.

Both convenience and policy dictate, however, that a minor should be able, like an adult, to make a will in contemplation of marriage. It is possible that a spouse could die after the wedding but before he has a chance to execute a will. A provision enabling a will to be made in contemplation of such a marriage recognizes that many young newlyweds may be understandably lax about attending to the making of a will after their marriage.

Some question arises concerning the manner in which a minor should be obliged to indicate that a will is in contemplation of marriage. We are of the view that a minor should not be able to avoid making an application for testamentary capacity by the simple expedient of making a will expressed to be in contemplation of an unspecified future marriage. Rather, we feel that the will should indicate on its face an intent to enter into a specific marriage, and the minor should actually marry the person indicated.

We are aware that it might be thought anomalous that a minor be empowered to make a will without first obtaining a grant of capacity under our second recommendation. As one of our correspondents noted in respect of a proposal in the Working Paper that would permit a minor to make a will in contemplation of marriage:

> One might, I suppose, question the conferring of testamentary capacity on a married minor. The maturity of married minors is not necessarily any greater than that of the unmarried; indeed, not too facetiously, it might be argued that the married minor is a living example of immaturity. The spouse of the minor is generally well protected by the law of intestacy, though I suppose that, in a case where there are children, by force of circumstances the children will be young, and it might be better in such a case if all of the property can be given to the other spouse.
>
> In any event, given the present law, [the Commission's proposal] makes eminent good sense.

The main issue is whether the rules of intestacy should prevail in every case where a minor wishes, but is unable, to execute a will prior to his marriage. We do not think the risk of an immature bride or bridegroom making an inappropriate will is so high that the rules of intestacy should inevitably apply. What risk there is in recognizing the practical advantages inherent in permitting intended spouses to execute wills is, in any event, tempered by the power of the court under the *Wills Variation Act* to vary the will in appropriate cases.

C. Military Personnel and Mariners

There are two categories of individuals who, by virtue of their employment, are permitted to make wills while under the age of 19: members of certain armed forces while on active service and mariners or seamen at sea. Our *Wills Act* does not specifically grant capacity to minors answering those descriptions. Instead it provides an exception to the minimum age requirement by cross-referencing section 7,[14] which deals with age requirements, to section 5 which describes the execution formalities required for a privileged will.[15] In order to ascertain who has the capacity to make a will while a minor, it is thus necessary to determine who may make a privileged will.

Because this particular area of succession law is unusually recondite, we have relegated such a review to an Appendix[16] and here record only our principal conclusions. The privilege for military personnel turns on concepts of "active service" and of membership in the Canadian Forces or certain foreign forces. The law surrounding both these concepts is needlessly complex and idiosyncratic. The exception for minor mariners is archaic.

We have concluded that the privilege extended to minor servicemen should not turn on concepts such as active service. We do not quarrel with the proposition that a minor serviceman should be permitted to draw a will. We are, however, concerned that it should be clear at the time the will is drawn that it may not be challenged because of the testator's minority. Therefore we think that membership in the armed forces should be the sole criterion governing the modified privilege. The *National Defence Act*[17] contains no definition of a "member" of the Armed Forces. Instead that Act refers to officers and men of the Armed Forces.[18] We think that provincial legislation should be framed in similar terms.

We do not think that the privilege granted to minor mariners is necessary. We see no ground for singling this profession out from among other dangerous activities. Moreover, our research has led us to believe that the use of the privilege by minor mariners is virtually unknown. Under the present *Wills Act*, the right to make a privileged will is also extended to certain minors who are members of the armed forces of Allied or Commonwealth countries. We think the position of foreign minors should be governed by the foreign law to which our courts would be directed under the appropriate choice of law rule. Later in this report we examine the rules governing the conflict of laws.

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[14] The *Wills Act*, R.S.B.C. 1979, c. 434, s. 7 (1).

[15] *Ibid.* s. 7 (1).

[16] Appendix H.

[17] R.S.C. 1970, C. N-4.

[18] The *National Defence Act* defines "officer" and "man" as follows:
"officer" means
- (a) a person who holds Her Majesty's commission in the Canadian Forces,
- (b) a subordinate officer in the Canadian Forces, and
- (c) any person who pursuant to law is attached or seconded as an officer to the Canadian Forces.

"man" means any person, other than an officer, who is enrolled in, or who pursuant to law is attached or seconded otherwise than as an officer to, the Canadian Forces.

D. Recommendation

The following recommendation incorporates our conclusions respecting grants of capacity to minors, the execution of a will by a minor in contemplation of marriage, and the privilege to execute wills enjoyed by minor servicemen. That part of the recommendation concerning "contemplation of marriage" adopts a broad view of when a will may be said to be in contemplation of marriage. The minor need not specifically state that the will is made in contemplation of a specific future marriage, if that intent can be gathered from the whole of the will. It would, of course, be prudent to include such a formal statement in the will. We do not think, however, that the failure to do so should necessarily invalidate the will.

The Commission recommends that:

2. *Section 7 of the* Wills Act *be amended by:*
   - *(a) adding the words "subject to subsection (5)" to subsection (1), and*
   - *(b) adding subsections comparable to the following:*
     - *(4) A minor may apply to the Supreme Court for a declaration that he has testamentary capacity notwithstanding that he has not reached the age of majority.*
     - *(5) Subsection 1 does not apply to:*
       - *(a) a will made by a minor pursuant to a declaration made under subsection 4;*
       - *(b) a will made by a minor which is expressed to be made in contemplation of his marriage if*
         - *(i) the will names the intended spouse, and*
         - *(ii) the marriage subsequently takes place; or*
       - *(c) a will made by an officer or man of the regular force of the Canadian Forces.*
     - *(6) Nothing in subsection 5 shall derogate from the power of the court to refuse probate of a will on a ground other than the minority of the testator.*

CHAPTER III FORMAL REQUIREMENTS

A. Introduction

In Chapter I we discussed the history of the introduction of formal requirements for wills into English law. We noted that the first statutory formalities merely required that wills disposing of realty should be in writing. Wills disposing of other types of property were subject to different rules. By 1833, the confusion surrounding the issue of the formal validity of a will led the Real Property Commissioners to recommend one simple form for wills disposing of any type of property. Effect was given to this proposal in the *Wills Act, 1837*, which provided:[1]

> That no will shall be valid unless it shall be in writing and executed in manner hereinafter mentioned; (that is to say,) it shall be signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction, and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary.

These requirements are essentially the same as the current requirements in England and British Columbia. In other jurisdictions, however, legislation validates instruments which do not conform with such requirements. In this chapter we consider the possibility of permitting new forms of wills in British Columbia.

B. The Purpose of Formalities

In considering what form of wills should be valid, debate has centred not so much on what formalities should be required, but rather on the question of whether formalities are necessary.[2] Early legislation was designed to protect the testator, as well as his rightful beneficiaries, from fraud and undue influence. The rationale justifying formalities was put forward by De Villiers in 1901 as follows:[3]

> It is obvious that wills are always more than other legal documents open to the dangers of fraud, perjury and forgery, duress and undue influence, and to doubts as to the mental capacity of the testator, for the reason that the testator is necessarily unable personally to guard against these dangers at the time when the will takes effect. On this account most or all systems of law have required some formality or other to be observed in the execution of wills.

A similar justification has recently been expressed by the English Law Reform Committee, which commented that the purposes of attestation rules are to:[4]

> . . . ensure, or go some way towards ensuring, that the document in question expresses the true will of a free and capable testator, i.e. that the following conditions exist:—
>
> (a) the document is executed by the person by whom it purports to be made;
> (b) he executes it as his will;
> (c) he knows its contents;
> (d) he is of sound mind;
> (e) he makes it free from undue influence, coercion, fraud, etc.

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[1] The *Wills Act, 1837*, 1 Vict. c. 26, s. 9.

[2] Palk, Simon, *Informal Wills: From Soldiers to Citizens*, (1976), 5 The Adelaide L. Rev. 382.

[3] De Villiers, J., Real and Personal Property in England, 105 (1901).

[4] The Law Reform Committee, England, *The Making and Revocation of Wills*, (Consultative Document) 1977, p. 4.

In the 20th century there have been a number of analyses of execution formalities which focus on the functions served by the formalities.[5] These functions may be described as fulfilling "evidentiary," "cautionary," "channelling" and "protective" purposes.

The evidentiary function is served by the requirement that wills be in writing. The primary purpose of the formalities required by the *Wills Act* can be described as providing evidence of testamentary intent and of the terms of the testator's wishes. The degree to which such evidence can be trusted will depend on the circumstances in which the will is executed.

The procedure surrounding the formal execution of a will is ceremonial and ritual, and therefore serves a cautionary function. Testators probably associate performing ceremonial tasks with the act of making a final will and not merely a preliminary draft. Accordingly they are put on notice that the contents of the document being executed are of importance. Testators are likely to take more care to understand their wills.

The provisions respecting the location of the testator's signature, and the requirement for independent witnesses can be seen as serving protective functions. The former seeks to render it more difficult to make unauthorized additions to the will. The latter seeks to ensure that unbiased evidence of the events surrounding the execution of the will can be adduced.

The channelling function can best be described as the effect of the other three functions. The formal document created by these prerequisites for valid execution can be taken on its face by all parties to be a valid will. Probate is thus made simpler, litigation and expense avoided, and advice made more certain. The document can move through the judicial system with a minimum of friction.

C. Oral Wills

Oral wills were originally valid in England. Nevertheless, over the past 400 years their use has been limited in stages. The first restriction on oral wills was imposed by the *Wills Act, 1540* which required wills of realty to be in writing.[6] The *Statute of Frauds* then invalidated oral wills of personalty of a value over £30 and placed limitations on oral wills of personalty under £30.[7]

In 1833 the Real Property Commissioners recommended that oral wills be abolished. This suggestion was implemented by the *Wills Act, 1837*.[8] In England an exception was retained, however, for persons entitled to make privileged wills, who continue to be entitled to make oral dispositions of personalty[9].

Some jurisdictions do make provision for oral wills. In Scotland, they are permitted for small bequests[10] and in the United States, a majority of states give effect to oral wills in prescribed circumstances.[11] In Spain, a person who is too ill to write, or who for some reason is unable to make a written will, may make an oral disposition of his estate provided he does so in the presence of at least five witnesses.[12]

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[5] Law Reform Commission of British Columbia, Report on the *Statute of Frauds*, 49-53, (LRC 33 1977) *See generally* Professor John Langbein, *Substantial Compliance with The Wills Act*, (1975) 88 Harv. L. Rev. 489; Gulliver & Tilson, *Classification of Gratuitous Transfers*, (1941) 51 Yale L.J. 1; Fuller, *Consideration and Form*, (1941) 41 Col. L. Rev. 799; Friedman, *The Law of the Living, The Law of the Dead: Property, Succession and Society*, [1966] Wis. L. Rev. 340. Institute of Law Research and Reform, Edmonton, Alta. Background Paper No. 2 on The Statute of Frauds, March 1979.

[6] The *Wills Act, 1540* 32 Hen. VIII, c. 1, s. 1.

[7] The *Statute of Frauds*, 1677 29 Car. II, c. 3, ss. 5, 19 and 21.

[8] The *Wills Act, 1837*, 1 Vict. c. 26.

[9] *Ibid.* s. 11. *See Re Jones*, (1981) 2 W.L.R. 106, (1980) 24 Sol. J. at 545.

[10] The Law Reform Committee, *supra* n. 4 at 1, 6 and 7.

[11] Rees, *American Wills Statutes*, 46 Va. Law Rev. 1960, 613, 636-640.

In British Columbia oral wills are not permitted even as privileged wills.[13] Although such wills might be useful in certain circumstances, such as when a testator is in peril,[14] on balance we believe that oral wills should not be permitted in British Columbia. We have outlined the functions served by execution formalities earlier in this Report. Any form of oral will which came close to providing the same safeguards would be so technical as to be practically useless.

D. Privileged Wills

1. ELEMENTS OF THE PRIVILEGE

In Chapter II, we recommended that with the exception of members of the regular force of the Canadian forces, minors in general should not have the capacity to execute a privileged will. In this chapter we address the question of whether adult soldiers and mariners should continue to occupy a privileged position under the *Wills Act*.[15] These testators enjoy a limited dispensation from the general execution formalities. A privileged will may differ from a formal will in a number of ways:

(a) The will may be unattested;

(b) If the will is signed by someone other than the testator, only one additional witness is required, instead of the two witnesses required for a formal will.

(c) The will is valid even if executed by a minor.

There is little evidence of modern use of this provision.

2. CURRENT ARMED FORCES PRACTICE

The current practice of the Canadian Armed Forces is an important consideration in determining the future of the privileged will. We are advised that the following procedures are used in the Forces:[16]

> (a) At the time of induction into the Armed Forces a recruit must complete a certificate advising where his will is then stored or specifying that he refuses to make a will. The recruit is encouraged to make a will and special lectures on the subject are given as part of the training program. If the recruit does not have a will, he completes one on a bilingual form (French-English) and it is executed in a formal manner in accordance with the *Wills Act* provisions;
>
> (b) The actual will is kept at the unit where the military testator is stationed, and on a quarterly basis, a "service-order" on the subject of wills is sent out and posted at the unit. As a result, Forces personnel are probably more conscious of the necessity to maintain an accurate will than other members of the general public;
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> (c) Prior to military personnel being sent on exercises or peace-keeping missions (for example, to Norway, Egypt or Cyprus) they are asked where their will is stored and whether it is up to date;

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[12] Mortlock, K.L., *Inheritance Planning and Wills in Spain*, 1978 New L.J. 1003.

[13] The *Wills Act*, R.S.B.C. 1979, c. 434, ss. 5 and 7.

[14] A former American draft provision [from the *Model Probate Code*, s. 49(b) 1946] suggests circumstances when it could apply:

(1) A nuncupative will may be made only by a person in imminent peril of death, whether from illness or otherwise, shall be valid only if the testator died as a result of the impending peril, and must be

(a) Declared to be his will by the testator before two disinterested witnesses;

(b) Reduced to writing by or under the direction of one of the witnesses within thirty days after such declaration; and

(c) Submitted for probate within six months after the death of the testator.

(2) The nuncupative will may dispose of personal property only and to an aggregate value not exceeding one thousand ($1000) dollars, except that in the case of persons in active military, air or naval service in time of war the aggregate amount may be ten thousand ($10,000) dollars.

[15] R.S.B.C. 1979, c. 434, s. 5 (1), (2) and (3).

[16] The summary is based on information supplied to the Commission by the Estates Division of the Armed Forces, Ottawa.

(d) The use of "privileged" wills by servicemen is not encouraged. When a member of the Forces leaves the service, however, his will is returned to him, and there may therefore still be some privileged ex-servicemen's wills in existence. These were often made in the back of service books where a preprinted form used to be located. In fact, the Estates Division of the Armed Forces, which handles approximately 120—135 estates per year, seldom if ever has to administer privileged wills, although we have been advised that a privileged will executed prior to the invasion of Sicily was probated recently in Manitoba.[17]

3. PRIVILEGED WILLS—FREQUENCY OF USE

An informal survey of Probate Registrars across Canada conducted to determine the frequency with which privileged wills are probated disclosed a distinction between provinces which permit holograph wills and those which do not. Those provinces which make provision for holograph wills reported little use of the privilege.[18] None of the jurisdictions canvassed kept a separate record of such wills nor were they apparently identified in record books in a special manner. Actual statistics are thus difficult to obtain, and the response we received was based on the impressions and recollections of office personnel.

In answer to our query whether a privileged will had been probated in the past 20 years three Surrogate Court offices replied that they had not handled any such wills,[19] and two replied that it was a rare occurrence, *viz.*, once in nine years and once in 19 years.[20] Two respondents stated that such wills were probated from time to time,[21] and one felt that it happened about once a year.[22] In Halifax, however, there are apparently about four or five privileged wills probated each year.[23] In British Columbia little use has been made of the provision despite the fact that we are a maritime province and our law does not make provision for holograph wills. A privileged will has not been probated in the Vancouver registry for many years.[24]

As probate officers do not keep a separate record of privileged wills, it is difficult to establish the ratio of privileged wills to formal wills. Our queries indicate that the only privileged wills being probated were executed many years ago. The disuse of this provision is also suggested by the absence of modern reported cases concerning the privilege in Canada.

4. REFORM

Recently, privileged wills have been the subject of some academic interest. In England one author suggested two modifications:[25]

> It may be thought that the scope of privileged wills should in one respect be restricted, and in another respect extended. The restriction would involve a limitation on the period of time for which a privileged will should remain effective.
>
> There would be much to be said for an enactment that a privileged will should remain effective only for, say, twelve months after the person making it ceased to be on actual military service or at sea. He would in that time have ample

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[17] Telephone call from Lieutenant-Colonel Macdonald, Judge-Advocate General's Office, Ottawa, on July 16, 1980.

[18] Information was requested from Registrars in the following cities: Toronto, Hamilton, Ottawa, Kingston, Fredericton, Halifax, Charlottetown, Edmonton, Calgary, Victoria, Vancouver, Winnipeg, Yellowknife, Whitehorse, Regina.

[19] Regina, Ottawa and Hamilton. The Hamilton office replied that they had not seen any, but because of personnel changes could not be certain beyond more than four years back.

[20] Victoria and Calgary respectively. The Calgary will dated from the Korean War and was probated in December, 1978.

[21] Manitoba and the Surrogate Court of Judicial District of York (Toronto).

[22] New Brunswick.

[23] The registrar suggested that perhaps this high incidence was due to the number of service personnel in the area.

[24] We are advised that a number of years ago some privileged wills executed by W.W. I veterans, who had completed wills in the back of service books, were probated.

[25] Mellows, Anthony R., The Law of Succession at 82. (2nd ed., 1973).

> opportunity to make a formal will, and so avoid the difficulties attaching to an informal one . . .
>
> On the other hand, it might also be thought that informal wills, similarly limited in life, could be made by any person in an emergency.

Another English commentator, A. L. Goodhart, suggests that the privilege be abolished entirely:[26]

> With all respect, there is something to be said for the view that under modern circumstances this so-called 'privilege,' instead of being extended, ought to be abolished altogether. In the past soldiers and sailors might find themselves in situations where they were deprived of all legal advice, but today it is true to say that the serving soldier is better advised than most civilians.

As previously noted, the Uniform Probate Code does not confer a privilege of this kind.

There are several arguments in favour of abolishing the privilege in British Columbia:

(i) The original reason for implementation of the privilege in Roman times seems to have been to avoid Rome's intestacy laws at any cost. It is not clear that the current British Columbia law concerning intestacy is such that a similar rationale can be advanced.

(ii) The privilege does not appear to be used by mariners or seamen at sea.

(iii) The privilege is meant to be exercised by military persons during periods of war or hostility. The Armed Forces, however, have been on active service for three decades and the imminent danger which justifies the existence of the privilege does not exist;

(iv) The practice of the Canadian Armed Forces is to encourage its members to keep their wills executed in standard form, in force and up to date.

We are persuaded that the privileged form of will for adult military personnel, mariners and seamen at sea should be abolished. Any need for a special form of will for these individuals is adequately met by our later recommendations respecting the introduction of informal wills into British Columbia.

Sections 5 and 7 of the *Wills Act* currently provide for privileged wills. They read as follows:

> **Military forces and mariners**
>
> **5.** (1) A member of the Canadian Forces while placed on active service under the National Defence Act, or member of the naval, land or air force of any member of the British Commonwealth of Nations or any ally of Canada while on active service, or a mariner or seaman at sea or in the course of a voyage may, regardless of his age, dispose of his real and personal estate by will in writing, signed by the testator at its end or by some other person in the presence of and by the direction of the testator.
>
> (2) Where the will is signed by the testator, there shall be no necessity for the presence, attestation or subscription of any witness.
>
> (3) Where the will is signed by another person, the signature of that other person shall be attested by the signature of at least one person, who shall attest in the presence of the testator and of that other person.
>
> **Infants**
>
> **7.** (1) A will made by a person who is under the age of 19 years is not valid unless at the time of making the will the person
>
> (a) is or has been married; or
>
> (b) is a person described in section 5.
>
> (2) For the purposes of section 5 and of this section, a certificate purporting to be signed by or on behalf of an officer having custody of the records of the force

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[26] Goodhart, A. L., *Note*, (1949) 65 L.Q.Rev. 6 at 7.

> in which a person was serving at the time the will was made setting out that the person was at the time a member of a naval, military or air force of a named country is sufficient proof of that fact.
>
> (3) A person who has made a will to which subsection (1) applies may, while under the age of 19 years, revoke the will.

We think that the best way of abolishing privileged wills is to repeal section 5 and and section 7 (1) (b) of the *Wills Act*. This repeal should not prejudice wills made before the repeal becomes effective. Section 7 (2) of the *Wills Act* provides for an expeditious means of proving membership in the armed forces of Canada or another country. We think that this section should be preserved, provided the reference to section 5 is deleted. Proof of membership in the armed forces of Canada or another country will still be necessary in respect of wills made before the repeal of section 5 and section 7 (1) (b), and in respect of wills made by a minor serviceman, who under our recommendation 2, will continue to enjoy the right to execute a will, notwithstanding his minority, if he is an officer or man of the regular force of the Canadian Armed Forces.

The Commission recommends that:

3. (a) Sections 5 and 7 (1) (b) of the Wills Act *be repealed.*

(b) The repeal of sections 5 and 7 (1) (b) should not invalidate any will that was validly made under the law in force when it was made.

(c) Section 7 (2) of the Wills Act *be amended by deleting "for the purposes of section 5 and of this section."*

(d) The words "subject to section 5" be deleted from section 4 of the Wills Act.

E. Formally Executed Wills

Following the recommendations of the Real Property Commissioners, the *Wills Act, 1837* introduced a standard execution procedure for all wills. These formal requirements, are embodied in the current *Wills Act* as section 4, which requires that:[27]

(1) The will must be signed at the end;

(2) The testator must sign in the presence of two witnesses; and

(3) The two witnesses must sign in the testator's presence.

Over the past 144 years it has been necessary for the courts to interpret each word or phrase in the section. For example, they have had to decide what constitutes a signature, and when the parties can be said to be in each other's "presence." In this part we examine some of the issues which have arisen under the present statutory requirements.

1. THE WILL MUST BE SIGNED AT THE END.

(a) "Signed"

The *Wills Act* requires that the will be signed at its end.[28] Courts have traditionally given a broad interpretation to the words "signed by the testator" and no particular form of signature is necessary. A person's mark,[29] or even a rubber stamp[30] have been held to be a signature. The words "mother"[31] and "your loving mother"[32] have also been found acceptable. Courts have been willing to give a broad interpretation to the word "signature" in order to validate a will whenever possible.

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[27] *Wills Act*, R.S.B.C. 1979, c. 434, s. 4.

[28] *Ibid.*

[29] *In the Goods of Bryce*, (1839) 2 Curt. 325; 163 E.R. 427.

[30] *In the Goods of Jenkins*, (1863) 3 Sw. & Tr. 93, 164 E.R. 1208

[31] *Re Smith Estate*, [1948] 2 W.W.R. 55.

[32] *In the Estate of Cook*, [1960] 1 W.L.R. 353, [1960] 1 All E.R. 689.

A will may be signed in the testator's name by a third party: Section 4(a) provides:[33]

> Subject to section 5, a will is not valid unless
>
> (a) at its end it is signed by the testator of signed in his name by some other person in his presence and by his direction;

The words "in his name" have proved to be ambiguous and doubt has been expressed whether the person signing at the testator's request could use his own name, or whether he had to actually write the testator's name.[34]

To avoid this ambiguity a change in wording appears desirable. This may involve possible conflicts with the equally ambiguous Uniform International Wills Law, where the words "on his behalf" are utilized. The importance of such a conflict is diminished by the liberal interpretation accorded this type of ambiguous provision by British Columbia Courts. In *Re Fiszhaut Estate*,[35] Macdonald J. of the British Columbia Supreme Court held that section 4 of the *Wills Act* ("in his name") did not prevent the person who signed for the testator using his own name rather than the testator's. There seems no reason why the signature of either the testator or the person assisting him to sign could not be used. We also see no reason to prevent the use of both signatures.

The question of whether a person may sign a document on behalf of a testator is one which arises in several contexts in this Report. A will must, of course, be signed by a testator. So must a codicil or other alteration to a will. A written revocation requires the testator's signature. We think that in each case, the testator should be able to avail himself of the services of another if for some reason the testator is not capable of affixing his own signature. Although the reference in sections 14 (revocation) and 17 (alteration) to documents made in accordance with the formalities governing the making of a will is effective to incorporate the provisions of section 4 governing the making of a will, we think that the right to execute a will or to alter or revoke it, through an agent should be made more explicit. We have therefore concluded that the *Wills Act* should contain a general "agency" power which should stipulate that the agent may sign in his own name, or in the testator's name, or in both names.

The Commission recommends that:

4. (a) Section 4 be amended by deleting "or signed in his name by some other person in his presence and by his direction."

(b) A new section comparable to the following be added to the new Wills Act*:*

> *For the purposes of this Act, anything signed by a person in the testator's presence and at his direction, in*
> *(i) the testator's own name,*
> *(ii) the name of the person directed to sign by the testator, or*
> *(iii) in both names,*
> *takes effect as if signed by the testator.*

(b) "At the End"

In interpreting the words "end of the will," the courts have not been lenient. In fact, early decisions invalidating wills following the introduction of the *Wills Act, 1837* were based on such highly technical faults that the English

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[33] *Wills Act*, R.S.B.C. 1979, c. 434.

[34] In a number of cases where the person signing the will for the testator has used his own name, the validity of the will has been questioned. *Re Fiszhaut Estate*, (1966) 55 W.W.R. 303 (B.C.S.C.). In *Re Goods of Clark*, (1839) 2 Curt. 329, 163 E.R. 428 and *Re Deeley and Green*, (1930) 64 O.L.R. 535, the courts found such a will valid.

[35] *Supra* n. 34.

Parliament added a provision to that Act expanding the definition of the term "end" to include other locations on the face of the will.[36] This expanded definition is incorporated into the *Wills Act* as section 6, which permits a will to be probated even though, *inter alia*, the signature is placed in the attestation clause or at the side or the end of the will; or that there are blank spaces intervening between the final words of the will and the signature.[37] Regardless of the location of the signature, it cannot give effect to any disposition or direction that is underneath or which follows the signature, or which was inserted after the signature was made. Such additions may be incorporated into the will by reference if words in the valid part of the will show an intention to incorporate the later words into the body of the will.

Courts have been presented with many opportunities to consider whether a will has been signed "at its end." In attempts to give effect to a testator's wishes, various stratagems have been employed, which not only severely test the language of the Act, but also produce conflicting results. A testator can sign his will in a number of places and still not fall within the permissive section of the Act deeming a signature to be at the end. Defectively placed signatures have included those at the beginning, in the middle, almost at the end, and on an envelope or other container.[38] Signatures appearing at the commencement of a will, or at the top of the first page, have been both permitted and disallowed.[39]

If a signature is found in the middle of the body of a will, a number of courses are open to a court. First, the *Wills Act* provides that dispositions following a signature are invalid. Thus, it is open for the court to permit probate of the portion preceding the signature.[40] Secondly, the court may find that although the signature is placed in the middle of the will, it was affixed after the whole of the will had been completely written out and was therefore written at the end of the will in temporal terms.[41] Thirdly, courts have rearranged the pages in a will so that the signature appears on the last page.[42]

The English Law Reform Committee has recognized that the difficulties this requirement poses for testators are such that the rule should be relaxed. In their 22nd Report, they concluded:[43]

> Whilst we accept that the end of the narrative is the normal place for putting the signature on any document, we see no compelling reason why a will should be invalid where the signature is at the top. The original reason for providing that the signature should be at the end of the will may have been to ensure that testators did not leave space in which to add further dispositions after execution. However those who use printed will forms often leave a large space between the end of the

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[36] 15 Vict. c. 24. *An Act for the Amendment of The Laws with Respect to Wills*, 1852, s. 1.

[37] *Wills Act*, R.S.B.C. 1979, c. 434, s. 6.

[38] *In Re Stalman*, (1931) 145 L.T. 339, the signature was squeezed in at the top of the will as there was no room at the bottom. In *Re Bercowitz*, (1962) 1 All E.R. 352 (C.A.) the testator signed at the beginning and end of the will. Only the former signature was attested. In *In the Goods of Harris*, [1952] 2 All E.R. 490, a signature at the top of a one-page will was held not to comply with the *Wills Act*. In the 1974 case of *Re Beadle*, [1974] 1 All E.R. 493, the testatrix signed the will at the top and on the envelope. Both signatures were held not to conform to the *Wills Act*. In the case of *Re Wright*, [1962] O.W.N. 122, an Ontario court rejected a will where the signature appeared on a printed form after the initial word "I".

[39] In *Re Roberts*, [1934] P. 102, the signature was affixed up at the top of the page, although the attestation clause started at the end. In an older case of *In the Goods of Wotton*, (1874) L.R. 3 P & D 159, the court read the paragraphs in a different order to make the signature fall at the end.

[40] In *Re Robertson*, (1972) 2 S.A.S.R. 481, the testatrix signed only the first page of her will and effect was given to those dispositive provisions which preceded the signature.

[41] See *Re Hornby*, [1946] P. 171, where the testator made a little box in the middle of the will, wrote out the rest and then signed it in the pre-drafted box.

[42] *Royle* v. *Harris and Others*, [1895] P. 163. In this case it was necessary for the court to distinguish *In the Goods of Wotton*, (1874) L.R. 3 P & D 159 in which the court read the will starting with page three and finishing with page two in order to find that it was signed at the end. *See also Re Smith*, [1831] P. 225; *and In the Estate of Long*, [1936] P. 166, [1936] 1 All E.R. 435. In Canada, *see Re Moir Thom* v. *Curtis et al.*, [1942] 1 W.W.R. 241, (Alta. S.C. App. Div.); *Re Wagner Estate*, (1959) 29 W.W.R. 34, (Sask. Surr. Ct.).

[43] 22nd Report on the Making and Revocation of Wills, 1980, Cmnd. 7902, at 5.

> narrative and the signature, so that the present rule does not necessarily avoid this danger. Moreover, section 1 of the 1852 Act makes it clear that the validity of a will cannot be challenged merely by the existence of such a space, which reinforces our conclusion that whatever the original reasons for the rule were, it is no longer necessary. The survey to which we have referred showed that of the 93 wills that were rejected for failure to comply with the strict formalities, 8 failed because the testator's signature was incorrectly placed. In our view, the test should simply be whether the testator intended his signature to give effect to his will, regardless of where that signature was placed. We therefore conclude and recommend that a will should be admitted to probate if it is apparent on the face of the will that the testator intended his signature to validate it. It is our view that, if this conclusion is accepted, the cumbersome provision contained in the 1852 Act can be repealed.

2. The Testator Must Sign in the Presence of Two Witnesses.

The *Wills Act* requires that a testator must make, or acknowledge, his signature in the presence of two or more witnesses who are present at the same time.[44] The rationale for this requirement is set out in the 1833 Report of the Real Property Commissioners, who concluded that:[45]

> The presence of witnesses is required in order to prevent fraud or coercion, and to prove the capacity of the testator; the number two was fixed on instead of one, in order to increase the chance that a witness would be living at the death of the testator, and in order to bring into play the difficulty of engaging an accomplice, the necessity of rewarding him, and the danger to be apprehended from his giving information; the two witnesses are required to be present together, in order to remove the possibility of getting two accomplices at different times, and in order to force them to tell exactly the same story in Court, and thus to render perjury more easily discoverable by cross-examination.

Where a signature is made in the presence of one witness who then signs the will, and is merely acknowledged later in the presence of another witness who thereafter signs it, the will is invalid. The witnesses must both be present when the testator signs his will or acknowledges his signature thereon.[46] The requirement that a will must be attested by two witnesses is widely known, but not the requirement that the testator sign the will or acknowledge his signature in the joint presence of the witnesses.

The Law Reform Committee of England examined the rule that a will must be executed in the joint presence of two witnesses in both its Consultative Document and in its 22nd Report on the Making and Revocation of Wills.[47] The Committee noted that when the Probate Registry made a practice of calling for evidence of attestation in cases where the phrase "he/she" or "his/her" were used, a significant proportion of wills were found to have been improperly attested. In a recent survey conducted by the Committee during a 13 week period, 34 wills were rejected on this ground alone.

In the United States, the Uniform Probate Code proposes abolishing the requirement that both witnesses be present when the will is executed. The English Committee, on the other hand, concluded:[48]

> Section 9 requires the two attesting witnesses both to be present at the time when the testator makes or acknowledges his signature. In our consultative document we sought views as to whether this aspect of the attestation rules was necessary or whether it could be abolished or relaxed. A number of those who submitted evidence to us thought that this rule was unnecessary and that the law should merely require the testator to write or to acknowledge his signature in the presence

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[44] The *Wills Act*, *supra*, n. 33, s. 4(b), *see also Wyatt* v. *Berry*, [1893] P. 5.

[45] Fourth Report of the Real Property Commissioners, 1833 at 17.

[46] *In the Goods of Allen*, (1839) 2 Curt 337, 163 E.R. 429; *Chesline* v. *Hermiston*, [1928] 4 D.L.R. 786 (Ont. S.C.) and *Re Brown*, [1954] O.W.N. 301 (Ont. Surr. Ct.).

[47] Consultative Document on the Making and Revocation of Wills (1977) at 10, 22nd Report, Cmnd. 7902, May 1980 at 5.

[48] *Ibid*.

> of each witness, but not necessarily the two together. However, we do not consider that this requirement causes any great injustice and on the whole we think it is right that the three necessary participants in the "ritual" of execution of a will should be present together during the essential part of it, namely the signature or acknowledgement of his signature by the testator.

The Committee went on to propose that the requirement be retained, subject only to an amendment to reverse the effect of *Re Colling*.[49] The effect of that amendment would be to make it clear that where the testator acknowledges a signature attested by one witness in the presence of both witnesses, the witness who had previously signed need not do so again.

3. THE TWO WITNESSES MUST SIGN IN THE TESTATOR'S PRESENCE

Section 4 (c) of the *Wills Act* requires that the witness must sign the will in the testator's presence. Courts have held that while the testator must be both physically present and mentally aware,[50] he need not actually see the witnesses sign so long as he could have done so if he had cared to look.[51] In 1833 the Real Property Commissioners recommended that this requirement, originally found in the *Statute of Frauds*, be abolished. Parliament retained it on the ground that it might prevent a witness from substituting a different will when the testator was not looking.[52]

Although witnesses must sign in the testator's presence, there is no requirement that they sign in each other's presence.[53] They may in fact sign separately in the testator's presence. Unlike the testator, who must sign at the end of the will, a witness may sign anywhere on the document.[54]

4. CONCLUSION

On the whole, we believe that the execution formalities inherited from the *Wills Act, 1837* have served us well. In the vast majority of cases these formalities are satisfied and their functions fulfilled. Even where it is questionable whether they have been satisfied, judicial creativity has been able to save many wills through a favourable interpretation of the *Wills Act*. Since a breach of these requirements invalidates a will, the number of formalities should be kept to a minimum consistent with the purposes of the Act.

Still, there can be cases in which the wishes of a would-be testator are frustrated. What is the best technique for keeping the number of such cases to a minimum? It would be possible to modify the formalities of the *Wills Act* to relax those aspects that most often create difficulties. This is the technique adopted by the English Law Reform Committee. We are not, however, convinced that it is the best means of reform. It leaves open the possibility that many wills may be rejected for failure to comply with a technical formality, even though the validity of the will is otherwise unquestioned.

The alternative which we prefer is one which would be less dependent on the form of a disposition, and which would instead concentrate on the reliability of an individual document as an indicator of testamentary intent. In the next part of this chapter, we shall examine options designed to so focus the court of probate's inquiry. Accordingly, we make no recommendations to change the law respecting the "formalities" of executing formal wills under the *Wills Act*.

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[49] [1972] 1 W.L.R. 1440.

[50] *Peden* v. *Abraham*, (1912) 8 D.L.R. 403 (B.C.S.C.).

[51] *Carter* v. *Seaton*, (1901) 85 L.T. 76.

[52] *Supra* n. 47 at 10.

[53] *Brown* v. *Skirrow*, [1902] P. 3; *Re Walterhouse*, (1922) 65 D.L.R. 670.

[54] *See*, *Re Dunlop*, (1928) 35 O.W.N. 217; *In the Estate of Denning*, [1958] W.L.R. 462; and *In the Goods of Ellison*, [1907] 2 I.R. 480.

F. Informal Wills

One method of decreasing the frequency of technically invalid wills is to permit a court to admit a document to probate even though it fails to comply with the formalities required for formal wills. For convenience we refer to such documents as "informal wills."

The acceptance of informal wills into modern law has come in two stages. First, a number of jurisdictions permit unwitnessed wills which are wholly in the testator's handwriting. These are known as "holograph wills." Secondly, several jurisdictions have enacted legislation that would permit informal wills of any description to be admitted to probate so long as certain tests are satisfied. We will examine both of these concepts.

1. HOLOGRAPH WILLS

In a number of Canadian and foreign jurisdictions, a testator can make a will by writing out his testamentary wishes in his own handwriting and signing this document. This type of will has come to be known as a "holograph will" and has been adopted by many civil law jurisdictions since the introduction of the *Napoleonic Code* in France. In areas where the civil law has exerted a great influence upon the common law, such as the southwestern United States, holograph wills have been recognized as an alternative and valid form for many years.

The introduction of "autograph wills" into English law was first considered in 1833 by the Real Property Commissioners.[55] While they were initially attracted by the concept, they did not recommend enactment of a provision validating unwitnessed handwritten wills.

In Canada wills which do not meet the formal execution requirements have been permitted in an increasing number of jurisdictions. Seven provinces and the two territories currently make provision for "holograph" wills.[56] The remaining three provinces,[57] including British Columbia, permit such wills only under their conflict of laws rules or as privileged wills.

It is unclear why holograph wills have been so widely accepted in Canada. The availability of such a provision in neighbouring states in the United States as well as in the Province of Quebec[58] may have encouraged its adoption. The inclusion of a provision validating holograph wills in the Uniform Wills Act undoubtedly contributed to their acceptability.[59]

The arguments in favour of permitting holograph wills in British Columbia may be summarized as follows:[60]

> (i) Such a provision will assist those in circumstances where it is difficult to comply with the formal attestation requirements, *viz*:
>   (a) those living in remote areas without access to solicitors;
>   (b) those *in extremis* who have no opportunity to arrange for the preparation or formal execution of a will;

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[55] *Supra* n. 45 at 21.

[56] Alberta: R.S.A. 1970, c. 393, s. 7.
Saskatchewan: R.S.S. 1965, c. 127, s. 7 (2).
Manitoba: R.S.M. 1970, c. W150, s. 7.
Ontario: S.O. 1977, c. 40, s. 6.
Quebec: C.C. Art. 842, 850.
New Brunswick: R.S.N.B. 1973, c. W-9, s. 6.
Newfoundland: R.S.N. 1970, c. 401, s. 2.
Northwest Territories: R.O.N.T. 1974, c. W-3, s. 6 (2).
Yukon: R.O.Y.T. 1971, c. W-3, s. 6 (2).

[57] Nova Scotia, Prince Edward Island and British Columbia.

[58] Civil Code of Quebec, Art. 850.

[59] The Uniform Wills Act, s. 6.

[60] *See* Law Reform Commission of Ontario, Report on the Proposed Adoption in Ontario of the Uniform Wills Act (1968) at 10.

> (c) those who, because of poverty, ignorance or prejudice, cannot or will not consult a solicitor.
>
> (ii) The majority of Canadian provinces provide for holograph wills, and such an enactment promotes uniformity of legislation in Canada.
>
> (iii) The stated policy of the law is to validate wills where possible.[61]

A holograph will tends to serve as evidence that the testator knew of the contents of his will, the handwriting identifies the maker of the will, and indicates that the contents represent the testator's true desires concerning the disposition of his estate.

In 1968 the Ontario Law Reform Commission explored the possibility of adopting holograph wills in Ontario. The Commission noted the following arguments against permitting holograph wills:[62]

> (i) The presence of witnesses lessens the possibility of forgery and makes it easier to prove that the will is the will of the testator;
>
> (ii) The provision for holograph wills would raise new problems requiring litigation to resolve; and
>
> (iii) A holograph will lends itself more readily to fraud or undue influence than does a will executed in the English form with the safeguard of witnesses.

In spite of these criticisms the Ontario Commission were of the view that a holograph will could more easily be proved to be the will of the testator than a typewritten document which he merely signs, notwithstanding the presence of witnesses. They suggested that a determined forger with accomplices would probably find it easier to forge a "formal" will under present law than he would to forge a holograph will.

In reply to the more serious suggestion that a testator making a holograph will may be susceptible to undue influence or fraud, the Ontario Commission argued as follows:[63]

> Jurisdictions in Canada, the United States and throughout the world (including Scotland), which have had holograph wills for many years, have not found it necessary to insist on further safeguards. It would be very difficult to induce a testator by fraud or trickery to make a holograph will through ignorance of its contents. If the testators writes out the provisions of the will in his own handwriting, he must, if he is capable, understand what he is writing, whereas if he is merely asked to sign a typed document even though in the presence of witnesses, he may well be under some misapprehension as to the nature or contents of the document. The presence of witnesses is no guarantee against fraud. The real value of witnesses in guarding against undue influence is open to considerable doubt.

In response to the argument that holograph wills would lead to increased litigation the Ontario Commission pointed out:[64]

> While it is probably true that holograph wills would bring more interpretation cases to the courts, no one can say how substantial the increase might be, and, in any event, it is difficult to accept this as an argument against them. A more cogent argument could be that the persons most likely to attempt a holograph will would also be those with the fewest assets available to pay for the cost of interpreting the will. But against that, such circumstances would be likely to diminish the economic justification of litigation. One could, by the same token, substantially

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[61] On the validation of wills, *see e.g.*, Lord Esher M.R. in *In re Harrison-Turner* v. *Hellard*, [1885] 30 Ch. D. 390, 393: "There is one rule of construction, which to my mind is a golden rule, viz., that when a testator has executed a will in solemn form you must assume that he did not intend to make it a solemn farce,—that he did not intend to die intestate when he had gone through the form of making a will. You ought, if possible, to read the will to lead to a testacy, not an intestacy." Mr. Justice Montague stated the principle in *Re Eames*, [1934] 3 W.W.R. 364, 42 Man. R. 474, as follows: "The Court owes a sacred duty to protect a man's last will. The guiding principle is to give effect if possible, to his intentions. Where the law designates a form in which such must be expressed this latter limits the operation of the principle, but the instrument itself is not destroyed. It is still the act of the deceased, and if the will is bad in one form it is good in another, the court must enforce it. Our statute encourages testators to draw their own wills. That being so the statute in any such will should be construed benignly and every effort made to avoid any construction which would invalidate the will."

[62] *Supra* n. 60.

[63] *Ibid.*

[64] *Ibid.*

> reduce the number of contract cases before the courts by making it obligatory for every contract to be prepared by a solicitor.

The Commission also commented that a survey of Canadian provinces which permit holograph wills found only 70 reported cases involving holograph wills between 1931 and 1963. A computer-assisted search indicates that there have been a further two dozen cases since that survey. One hundred reported cases spread over half a century does not indicate a substantial increase in the volume of estate litigation.

The objection that the introduction of holograph wills will result in new problems is well taken. Although the problems so generated are far from insoluble, their existence detracts somewhat from the desirability of holograph wills. For that reason, a brief survey of some of the problems which have arisen in other jurisdictions which have introduced such provisions is in order.

(a) Uncertain Interaction with the Provisions Respecting Formal Wills

Should holograph wills be subject to the same requirements as formal wills, save for the need for witnesses? This question is raised in large measure by the tendency of legislation merely to validate holograph wills without specifying the relationship between that form of will and the traditional form.

The point has arisen in several contexts. In *Re Chapman*,[65] the Manitoba Surrogate Court per Lindal, Surr. Ct. J., held that a formally attested will could be altered by an unattested holograph codicil. In so holding he declined to follow the Saskatchewan case of *Re Violet Bennie Estate*.[66] In that case Mr. Justice Taylor of the Court of Queen's Bench, stated the issue as follows:[67]

> The requirements for the execution of a will had been set out in the 1930 revision and in previous Acts respecting the execution of wills and were carried into the Act of 1931 verbatim . . . In 1931 a new subsection, designated as "new" (2), was added to sec. 6:
>
> > (2) "A holograph will wholly in the hand-writing of the testator and signed by him may be made, without any further formality or any requirement as to the presence of or attestation or signature by any witness."
>
> The question now to be determined is whether the wording in this subsec. (2) "a holograph will" carries with it the definition that "will" includes a testament, a codicil, etc., as above quoted. Does the definition of the word "will" include a holograph codicil to a will? It will be noted that if such had been the intention of the legislature, the intention could have been expressed by referring to a holograph will or holograph codicil to a will. I note particularly that in the definition clause the word "will" is set apart as I have written it; and this singles it out specifically.

Mr. Justice Taylor refused to give effect to the holograph codicil. He held that in the absence of legislation specifically authorizing holograph codicils, the definition of "will" should not be extended to holograph wills so as to permit holograph codicils.

A similar issue arose before the Manitoba Court of Appeal in *Re Tachibana*.[68] There, the testator's signature appeared on two places in the unattested holograph will, although unfortunately not at its end. Accordingly, the will did not satisfy the requirements of section 6 of the Manitoba *Wills Act* then in force[69] which required that a will be signed at its "end or foot." Mr. Justice Freedman, speaking for the Court, held:

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[65] (1959) 18 D.L.R. (2d) 745.

[66] (1957) 22 W.W.R. 118.

[67] *Ibid.* 120-121.

[68] (1968) 66 D.L.R. (2d) 567.

[69] R.S.M. 1954 c. 293.

> A holograph will very properly stands on a different footing from that of an ordinary will and should not be subject to the formalities required of the latter. When a person proceeds to write out his will in his own hand one does not expect, nor does the law exact from him, the same strict compliance with statutory provisions of form as is imposed upon a testator who, in a much more formal manner and usually with the aid of a lawyer, has his will drawn up, to be solemnly executed in the presence of two witnesses. That is precisely why s. 6(2) dispenses with any further formality beyond the requirement that a holograph will be wholly in the handwriting of the testator and signed by him. The subsection, it may be noted, is silent as to the location where the testator's signature must be placed. To say that the signature must appear at the end or foot of the will is only possible if we conclude that s. 6 (1) and s. 7 of the *Wills Act* apply to holograph wills. In my view they do not.

(b) Is the Document a Will?

Not every handwritten document is necessarily a will. It is not sufficient that a document be in the handwriting of a deceased person and signed by him if it does not also evince a testamentary intent. It must express an unconditional desire on the part of its author that the document operate to direct the passing of his property upon his death.

The question of testamentary intent is rarely an issue in a will executed in accordance with the present *Wills Act*. When informally prepared documents are submitted to probate, however, it is sometimes difficult to attribute testamentary intent to their author. The most common situation where testamentary intent is questioned involves bequests made in a letter or series of letters. These writings may take effect as a series of mutually consistent wills. The issue which must then be faced is whether, and to what extent, the letters reflect a settled testamentary intent. It may be necessary to prove the testator's intention by extrinsic evidence.

As a general rule the courts in Canada will admit extrinsic evidence in an effort to determine whether a testator intended the impugned documents to have testamentary effect. In *Re Gray; Bennett* v. *Toronto General Trusts Corporation*, the Supreme Court of Canada stated:[70]

> There is no controversy, either in the reasons for judgment in the Courts below, or between the parties, that under the authorities, a holographic paper is not testamentary unless it contains a deliberate or fixed and final expression of intention as to the disposal of property upon death, and that it is incumbent upon the parties setting up the paper as testamentary to show, by the contents of the paper itself or by extrinsic evidence, that the paper is of that character and nature . . .

Thus the courts are free to take into account any evidence probative of testamentary intent. Such a practice obviously accords with the general policy of the law to validate wills where possible.[71] There is no pressing reason to restrict courts to the four corners of a document alleged to be a holograph will or to restrain them from admitting evidence which they would otherwise hold to be probative of testamentary intent.[72]

(c) Pre-printed forms

Civil law jurisdictions traditionally require the whole of a holograph will to be in the handwriting of the testator. For example, the new draft *Civil Code* of Quebec provides:[73]

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[70] [1958] S.C.R. 392, 396 *per* Fauteux J.

[71] The Supreme Court of Canada affirmed that extrinsic evidence was admissible on the question of testamentary intent in *Molinari* v. *Winfrey*, [1961] S.C.R. 91; *Canada Permanent Trust Co.* v. *Bowman*, [1962] S.C.R. 711. On the question of testamentary intent *see also Re Benton's Will*, (1959) 29 W.W.R. 657, (Alta. S.C. App.Div.): *Rudolph* v. *Public Trustee*, [1972] 4 W.W.R. 248 (Alta S.C.), *Re Williams*, [1973] 5 W.W.R. 84 (Man. Surr. Ct.).

[72] For other cases concerning testamentary intent in holograph wills *see McMurtry* v. *Scarrow et al.*, [1938] 2 W.W.R. 39; *Re Williams*, [1973] 5 W.W.R. 84. In *Re Toole Estate*, [1952] 5 W.W.R. 416 (Alta. D.C.) the oral declarations made by the testator were admitted as evidence of testamentary intent.

[73] Civil Code Revision Office, Report on the Quebec Civil Code, (1977) Vol. 1, p. 177, Art. 268.

> A holograph will must be written entirely in the hand of the testator and signed by him.

Canadian common law jurisdictions which permit holograph wills also r quire them to be wholly in the handwriting of the testator. The *Uniform Wil Act* provides, for example:[74]

> A testator may make a valid will wholly by his own handwriting and signature, without formality, and without the presence, attestation or signature of a witness.

Where a testator attempts to make a will on a preprinted form but fails t execute it properly, so that it cannot be probated as a formal will, an objectio may be taken to the admission of the document to probate as a holograph wil on the ground that it is not wholly in the testator's handwriting. It ma nevertheless be possible to argue that the handwritten portion of the documen constitutes a holograph will and that such parts of the will which are wholly i the testator's handwriting should be admitted to probate. The options open t the courts in Canada are to refuse probate to the document, to admit the will t probate, or to admit only the portions written in the testator's own handwriting. In the face of the strict language of statutes providing that the will must be wholly in the handwriting of the testator, no Canadian court has yet admitted the complete document to probate. Two lines of authority have discussed the problem, the first line refusing probate, and the second granting probate to the handwritten portions only.

The first series of authorities is based on the case of *Re Rigden Estate*.[75] In that case the testator had filled in the blanks in a standard form will. The will was held to be invalid as it was not wholly in the handwriting of the testator. The Saskatchewan Surrogate Court was not, however, in any doubt as to the authenticity of the document or as to its being an expression of the testator's actual testamentary intent. This case was followed by the Saskatchewan Surrogate Court in *Re Griffiths Estate*,[76] where the Court posed the question:

> To bring the document within subsection (2) above, as a holograph will, it must be established that it is 'wholly in the handwriting of the testator and signed by him.' Can a document such as this, which is only partly in the handwriting of the testator and the remaining part printed, be said to be wholly in his handwriting?

The answer was in the negative, and the document was not admitted to probate. The Court did not appear to consider the possibility of admitting only the handwritten portions of the will.

Under the second line of authority the handwritten portion of the document has been admitted to probate as a will. In the cases of *Re Ford Estate*,[77] *Re Austin*,[78] and *Re Laver Estate*,[79] the court admitted to probate such parts of the document as were in the handwriting of the testator, exempting from probate those parts which were printed. The difficulty which would undoubtedly arise as to the interpretation of incomplete sentences in the handwritten portions was left to a court of construction.

In a recent Manitoba case, *Re Philip*,[80] the Surrogate Court, while reviewing this line of authority, specifically examined the three western Canadian cases referred to above and concluded as follows:

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[74] S. 6. This provision is found in several statutes.

[75] [1941] 1 W.W.R. 566.

[76] [1945] 3 W.W.R. 46.

[77] [1954] 13 W.W.R. 604 (Alta. D.C.).

[78] (1967) 61 D.L.R. (2d) 582 (Alta. S.C. App. Div.).

[79] (1957) 10 D.L.R. (2d) 279 (Sask. Q.B.).

[80] [1978] 4 W.W.R. 148 at 160.

> With respect, I am of the view that the *Ford*, *Laver* and *Sunrise Gospel Hour [Austin]* decisions were wrongly decided. They appear to be decisions of convenience in which the courts, having perceived the apparent intentions of the testator, have given effect to those intentions in spite of the lack of compliance with statutory requirements of formality. As the old saw puts it: 'Hard cases make bad law.'

On appeal Mr. Justice O'Sullivan, while noting that the Surrogate Court had subjected the earlier decisions to "trenchant criticism," held that Mrs. Philip did not intend to incorporate the printed words contained on the form into her will but merely intended to use the printed form as a guide. As a result, the Court admitted the handwritten portions of the will to probate on the ground that the testatrix did not intend to incorporate the printed words into the will. It specifically refrained from deciding whether printed words should be ignored in cases where the testator intended to adopt or incorporate such printed words but where the court concludes that these words are surplusage.[81] In contrast, the Saskatchewan Court of Appeal in *Re Forest*[82] held that the written words themselves could not be probated as a holograph will unless they were effective to implement a dispositive intent. The law is therefore unsettled.

2. Other Informal Wills

(a) Generally

A holograph will is merely a type of informal will which, by virtue of its attributes, contains on its face sufficient evidence of testamentary intent and authorship to displace any fear that such a document might not truly express the intentions of the testator. A proposal which extends only to holograph wills, although it may be carefully drafted to avoid problems which have arisen in other jurisidictions, nevertheless involves making an arbitrary distinction between holograph wills and other possible informal wills.

Excessive reliance on compliance with statutory requirements respecting form without regard to the functions performed by those requirements leads in our view to undesirable rigidity. Earlier in this paper we referred to the four functions of formal requirements. If a document undeniably expresses the deceased's testamentary intent, none of the policies to which we referred is served by refusing to accept it for probate. Formalities are designed to produce a document easily recognizable as an expression of testamentary intent. If the document in issue undeniably expresses the testator's true intent, then it possesses the very characteristics which the imposition of a standard form is designed to produce, and there seems little reason in such a case to insist upon strict compliance with the prescribed form.

We believe that the policies which support the introduction of holograph wills equally support a broader proposal. A recommendation restricted to holographs wills has a major drawback: the new form of will would itself be subject to a rule of strict compliance which could result in the refusal to give effect to a testator's undeniable wishes. This view is buttressed by Lord Mansfield who, as long ago as 1757, opined:[83]

> I am persuaded many more fair wills have been overturned for want of the form, than fraudulent have been prevented by introducing it. I have had a good deal of experience at the delegates; and hardly recollect a case of a forged or fraudulent will, where it has not been solemnly attested. It is clear that Judges should lean against objections to the formality. They have always done so, in

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[81] *Ibid.*

[82] [1981] 2 W.W.R. 116 (Sask. C.A.).

[83] *Windham* v. *Chetwynd*, (1757) 1 Burr 420, 97 E.R. 377.

> every construction upon the words of the statute . . . and still more ought they to do so, if that system would spread a snare, in which many honest wills must unavoidably be entangled.

A recommendation which concentrates on the substantial questio which concern a court on an application for probate—the authorship of th will and testamentary intent—rather than the sterile question of complianc with form, would no longer require the strict compliance with any particula form.

(b) Substantial Compliance

Current law requires the formalities stipulated by the *Wills Act* for the execution of wills to be strictly followed. Failure to observe the formalities stipulated by that Act renders a will invalid even if the mistake was entirely harmless. Our courts have taken this strict approach for two reasons. First, the testator is dead and cannot assist in ascertaining the validity of the will. Second, even if the will is declared invalid, on the resulting intestacy a distribution is provided for under the *Estate Administration Act*.

The 1974 English case of *Re Beadle*[84] is an example of a document to which probate was refused on the sole ground that it failed to meet the requisite formalities. The testatrix had dictated her wishes to a friend, who transcribed them onto one piece of paper. The testatrix then signed the top corner of the paper and the husband of her friend signed as a witness. The purported will was placed in an envelope and both acquaintances signed the envelope. R.W. Goff, J. held that although there was no doubt at all that the paper contained the testatrix's true testamentary wishes, and that she fully understood its effect, probate of the will had to be refused on a strict interpretation of the statute and the authorities.

Responses to the strict compliance rules have taken at least three different forms, as legislatures, the courts, and law reform advocates have suggested methods to prevent the harsh results which come from the strict application of formal requirements. Soon after the introduction in 1837 of the provision which required that a will be signed at its "end," Parliament relaxed it. This was accomplished by deeming a will to be signed at its foot or end even though it was signed in any one of a number of different places.[85] This modification is part of the *Wills Act* of this Province.[86]

The judicial response has been to uphold the rule on the one hand, and on the other to be permissive in allowing various activities to meet the requirements of the statute. For example, even the slightest of "indications" by an ill testator has been held to constitute an acknowledgement of his signature permitting witnesses to attest. In another case the term "presence" was extended to include a testator who did not see the witnesses sign the will but could have done so if he had cared to look.

Courts have also had to rule on the validity of a will where the parties have used the proper procedure but have executed the wrong documents. For example, spouses occasionally sign each other's will by accident. If the mistake is not noticed until after the death of one spouse, then the court is faced with three options. It may refuse to admit the will to probate, admit part of the spouse's will to probate, deleting references to that spouse, or admit the executed will to probate and correct the document by inserting the proper names. Courts in all of the western Canadian provinces have chosen the third option and have rectified and replaced the wording contained in the will.[87]

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[84] *Supra* n. 38.

[85] The *Wills Act Amendment Act*, 1852 15 Vict. c. 24.

[86] *Wills Act*, R.S.B.C. 1979, c. 434, s. 6.

Thirdly, advocates of law reform have recently criticized the rule requiring strict compliance with the *Wills Act, 1837*. In the United Kingdom the Law Reform Committee has suggested that attacks on form may have ulterior motives:[88]

> A further relevant point is that it seems that the validity of wills in general, and of their attestation in particular, is often challenged for reasons which have no connection with the question whether the will represents the testator's true intentions. In other words, the challenger is not concerned to give effect to what the testator wanted; he dislikes the provisions of the will—no doubt because it deprives him of benefits which he would have had under an earlier will or under the rule of intestate succession—and wants to upset it by any means that lie to hand. It has been suggested that the present attestation rules lend themselves to behaviour of this kind.

In the United States several writers have suggested that a will which does not conform with the formalities of the *Wills Act* might still be validated. For example, one commentator has concluded:[89]

> That some forms of expression are *prima facie* valid does not, however, require that all other forms of expression be held invalid. Even though many other forms of testamentary transfer are presently allowed under trust, contract, or other theory, many indications of testamentary intent, not articulated in traditional legal forms, are denied validity solely because of their failure to meet the formal requirements of a will, notwithstanding total absence of question as to their being true expressions of testamentary desire. Many of these expressions it is suggested, could reasonably be validated, so long as the basic elements of a valid testament—testamentary intent, dispositive scheme, and lack of influence—could be proved by clear and convincing evidence.

In a 1975 article which has attracted much attention, another American scholar, John Langbein, called for the introduction of the doctrine of "substantial compliance" to the law of wills. Professor Langbein has expressed the view that:[90]

> The rule of literal compliance with the Wills Act is a snare for the ignorant and the ill-advised, a needless hangover from a time when the law of proof was in its infancy. In the three centuries since the first *Wills Act* we have developed the means to adjudicate whether formal defects are harmless to the statutory purpose. We are reminded "that legal technicality is a disease, not of the old age, but of the infancy of societies." The rule of literal compliance has outlived whatever utility it may have had. The time for the substantial compliance doctrine has come.

Since this call for substantial compliance was published, Professor Langbein reports that he has received only favourable response. He advises that he has yet to meet a scholar in the field of trust and estate law who has expressed disagreement on the merits of a substantial compliance doctrine.[91] In another recently published article Professor Langbein reiterated his view that courts in the United States should adopt a substantial compliance doctrine and admit wills to probate despite technical defects.[92]

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[87] *See Re Brander*, (1952) 4 D.L.R. 688 *per* Wilson J. (B.C.S.C.) and by the same judge, *Re Duck* [unreported] but cited in (1953) 31 B.C.R. 444. In Saskatchewan, *see Re Bohachewski Estate*, (1967) 60 W.W.R. 635 (Sask. Surr. Ct.) per Maher J. In Alberta, *see Re Knott*, (1959) 27 W.W.R. 382, a decision of the Alberta District court involving spouses executing each other's wills. The British Columbia decisions have been commented on by Dr. G. Kennedy; *Case and Comment*, (1953) 31 Can. B. Rev., 185 and 444. The Australian State of Queensland recently proposed to amend their succession law by including specific provision permitting a court to insert the necessary correcting language in a will instead of merely deleting certain words. (Working Paper on a Bill to Consolidate and Amend the Law of Succession and the Administration of Estates, (1975) section 31, *Power of Court to Rectify Wills*.)

[88] *Supra* n. 47.

[89] Gaubatz, John, *Notes toward a Truly Modern Wills Act*, (1977) 31 U. of Miami L. Rev. 497 at 560.

[90] Langbein, *Substantial Compliance with the Wills Act*, (1975) 88 Harv. Rev. 489 at 531.

[91] Correspondence, John Langbein to Law Reform Commission, April, 1979.

[92] Langbein, *The Crumbling of the Wills Act*, (1979), 65 A.B.A.J. 1192–1195.

The adoption of a rule of substantial compliance has been proposed for Queensland. The Law Reform Commission of Queensland in their Report No. 22 suggested the enactment of the following provision:

> The court may admit to probate a testamentary instrument executed in substantial compliance with the formalities prescribed by this section if the court is satisfied that the instrument expressed the testamentary intention of the testator.

In some respects even this reform has a fairly limited scope. A doctrine of "substantial compliance" presumes that the testator or witnesses attempted a standard form will, but erred in its execution in some technical aspect. In most cases in which an executor propounding a will would rely on a doctrine of "substantial compliance" the will would closely resemble a standard form will.

A proposal merely to abolish strict compliance with the *Wills Act* raises difficult questions concerning when a defect is a mere technical failure to fully comply with the Act, and when it is a result of the parties completely ignoring formal requirements altogether. Does a will attested by only one witness "substantially comply" with the present *Wills Act*? A proposal for reform which concentrates on an attempted compliance with technical rules leaves open cases where, because the document in issue in no way resembles a standard form will, the court must refuse it probate even though convinced that the document truly represents the testator's last wishes.

It has been suggested that it is only necessary to relax those requirements which have been found to give the most problems to testators.[93] This is, in our view, tantamount to a type of "ad hoc" substantial compliance doctrine. It does not address the fundamental problem posed by an undue reliance on formalities without regard to the purposes which they serve. Moreover, one might argue that such an approach is inconsistent. If formalities fulfill a valuable function, then it is inevitable that documents which fail to comply with the *Wills Act* will be refused probate. However, a proposal to relax certain formalities is, in effect, an acknowledgement that in some cases, insisting on strict compliance can cause hardship. If, for example, the justification for two witnesses is that it helps prevent fraud, reducing the requirement to one witness is an acknowledgement that the protection offered by the original formality was not as important as the hardship in an individual case. From this point, it is only a small step to adopt a dispensing power in which that determination can be made on a case by case basis.

(c) A Dispensing Power

(i) Generally

Several jurisdictions have either enacted, or considered enacting, a provision giving a court the discretion to admit documents to probate, even though the *Wills Act* formalities have not been observed. Such a power may, but need not be, framed in terms of "substantial compliance." We shall examine individually the dispensing powers enacted in, or proposed for, a number of jurisdictions.

(ii) Canada: The Indian Act[94]

Sections 42 to 50 of *The Indian Act* vest broad powers in the Minister of Indian Affairs and Northern Development to regulate the manner in which the property of an Indian resident on a reserve[95] devolves upon death. Section 45 of the Act provides:

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[93] *See, e.g.*, The Law Reform Committee, 22nd Report, 1980, W.F. Ormiston, *Formalities and Wills: A Plea for Caution* (1980) 54 Aust. L.J. 45.

[94] R.S.C. 1970, c. 1-6. *See A.G. Can. and Rees* v. *Canard*, [1975] 3 W.W.R. 1 (S.C.C.) in which the relevant sections of this Act were held to be *intra vires*.

[95] *See ibid*. section 4 (3).

> **45.** (1) Nothing in this Act shall be construed to prevent or prohibit an Indian from devising or bequeathing his property by will.
>
> (2) The Minister may accept as a will any written instrument signed by an Indian in which he indicates his wishes or intention with respect to the disposition of his property upon his death.
>
> (3) No will executed by an Indian is of any legal force or effect as a dispostion of property until the Minister has approved the will or a court has granted probate thereof pursuant to this Act.

The discretion vested in the Minister under section 45 (2) operates in precisely the same fashion as a dispensing power would in practice. The Minister may, but is not required to, accept an informal will for probate. His discretion is limited by two threshold requirements: there must be a written instrument and it must be signed by the testator.

In response to our query concerning departmental practice under this section, we were advised that the Minister generally approves any testamentary document in writing. It need not be handwritten by the testator. Unwitnessed wills are rare, and only four have been submitted for the Minister's approval in the last four years. Witnessed holograph wills appear to be fairly common. On the whole, it would appear that informal wills have caused few problems.[96]

(iii) South Australia

On the recommendation of the Law Reform Commission of South Australia, the Supreme Court in that jurisdiction has been given the power to admit a document to probate even though it may not have been executed with all of the formalities required by the *Wills Act*. In 1975, the governing statute was amended to provide that:

> A document purporting to embody the testamentary intentions of a deceased person shall, notwithstanding that it has not been executed with the formalities required by this Act, be deemed to be a will of the deceased person if the Supreme Court, upon application for admission of the document to probate as the last will of the deceased, is satisfied that there can be no reasonable doubt that the deceased intended the document to constitute his will.

As far as we are aware, only one reported case deals with the South Australian Supreme Court's power to admit defective wills to probate under this dispensing power.[97] In the 1977 case of *Re Graham*,[98] detailed consideration was given to the South Australian provision. The facts of the case are simple. On April 4, 1977, an estate administration officer for Bagot's Executor and Trustee called on the recently widowed Mrs. Graham to discuss her late husband's estate. While he was at her home, the trust officer also received and recorded Mrs. Graham's instructions for her own will. He then returned to his office, had a will prepared in accordance with the instructions and returned to Mrs. Graham's house the following day. As there was no one at home, instructions for execution were noted on the document and he left it there to be signed by Mrs. Graham.

Mrs. Graham subsequently signed the will and then gave it to her nephew and requested that he "get it witnessed." The nephew took the will to two neighbours who signed as witnesses in his presence but not in Mrs. Graham's presence. The will was returned to Mrs. Graham by the nephew. On May 18, 1977 Mrs. Graham died leaving approximately $10,000 to her nephew in the impugned will. The procedure adopted did not meet the statutory requirements for execution, as the deceased had not signed the will in the presence of either witness, nor had the witnesses signed in Mrs. Graham's presence.

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[96] Letter from P.M. Tellier, Deputy Minister, to the Commission, February 26, 1981.

[97] Letter dated 2nd January, 1979, from the Chairman, Law Reform Committee of South Australia.

[98] *Re Graham*, (1978) 20 S.A.S.R. 200, per Jacobs J.

When the document was presented for probate, Jacobs J. stated:[99]

> Upon these facts, I have not the slightest doubt that the deceased intended the document which is before me to constitute her will. Accordingly, if the words of s. 12(2) of the Wills Act are to be given their plain and natural meaning, there is no reason at all why the document should not be deemed to be the will of the deceased, and admitted to probate as such, notwithstanding that it has not been executed with the formalities required by the Act.

The court in admitting the will to probate was of the opinion that the section should be given a broad and remedial interpretation. Jacobs J., who had assisted the South Australian Law Reform Commission in formulating its proposal that the court be granted such a power, concluded:[100]

> But if there is one proposition that may be stated with reasonable confidence, it is that s. 12(2) is remedial in intent, that is to say, that its purpose is to avoid the hardship and injustice which has so often arisen from a strict application of the formal requirements of a valid will, as dictated by s. 8 of the Act. This conclusion is, I think, clearly justified upon a review of the legislative history of the relevant sections of the Act, and the cases.

(iv) Israel

Since 1965, the Israeli Succession Law has contained a remedial provision enabling the courts to admit to probate a technically defective will. It provides:[101]

> Where the court has no doubt as to the genuineness of a will, it may grant probate thereof notwithstanding any defect with regard to the signature of the testator or of the witnesses, the date of the will, the procedure set out in sections 20 to 23 or the capacity of the witnesses.

No comprehensive studies are yet available on the Israeli experience with this provision. We are advised that there are few reported cases concerning the application of this section.[102]

The following comments are an approximate translation of remarks contained in the 1952 official draft Succession Law:

> The purpose of the requirements of the Act concerning the form of a will is to verify the wishes of the testator and to safeguard against forgeries and frauds. The details of form do not serve as a perfect or sole guardian against mischiefs and they should not be considered as being of overriding importance or absolute value. The courts should therefore be granted some discretion to alleviate rigid compliance with formal requirements as long as the genuineness of the will is beyond doubt. Our proposal is inspired by the general tendency to get rid of extensive formalism and prefer substance to form.
>
> Jewish Law dictates on the one hand strict compliance with certain formulae . . . on the other hand it developed the concept of "*Mitzvah* to carry out the wishes of the deceased". No such provision has been found in foreign law.

The leading Israeli case on the application of this provision is the 1977 decision, *Briel* v. *The Attorney-General*.[103] In this case, the District Court had refused to grant probate even though it had no doubt as to the genuineness of the will. The will was in breach of the succession law because it did not contain the date on which it was made. The Supreme Court allowed an appeal from the District Court's decision and made the following comments on the scope of the statute:[104]

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[99] *Ibid*.

[100] *Ibid*.

[101] Section 25 of the Israeli Succession Law 5725-1965.

[102] Letter from Dr. F.S. Perles, Advocate of Tel-Aviv, Jaffa, Israel dated December 18th, 1979.

[103] Israel C.A. 869/75, 32 P.D. 98.

[104] Since none of the cases interpreting section 25 have been officially translated from the Hebrew, this version is not authoritative. The concept of "mitzvah" is not readily translatable. It is literally a religious obligation, although in some contexts it may denote only a moral obligation or even merely a general obligation to assist others. We are advised that the "mitzvah" to carry out the wishes of a deceased person is a religious obligation: in effect a command from God.

> The question of all questions regarding the scope and operation of section 25 is always the "genuineness of the will." The court has to be first convinced, beyond all doubt, that it is indeed faced with a genuine will. Were it so convinced, the [formal] defects should not prevent it from granting probate of the will. Were it not convinced, even one defect requires it to abstain from granting probate.
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> It was already decided that a will which has no formal defect is presumed to be genuine and the one alleging invalidity carries the burden of proof . . . The presumption does not apply to a will which contains a formal defect and the one seeking grant of probate carries the burden of proving the genuineness of the will.
>
> In each and every case in which this Court has refused to grant probate to a will for formal defects, doubt existed as to the genuineness of the will and it is insignificant whether the doubt was raised for the formal defect itself . . . or for one of the matters dealt with in Art. B . . .
>
> Even the absence of a date [of making the will] might in certain cases raise a doubt as to the genuineness of the will . . . as, for example, in a case of several conflicting wills . . .
>
> The legislator's "guide-line" in the Law of Wills is the *Mitzvah* to carry out the wish of the deceased: Where the intent of the testator is expressed in a will, and no doubt exists as to the genuineness of the will, then his intentions should be ascertained (Sec. 54 (a)) in order to uphold the wishes of the deceased and not to frustrate them merely for a formal defect.

It should be noted, however, that that case also sets out certain threshold requirements which must exist before section 25 can be invoked in aid of a defective will. The court stated:[105]

> The discretion granted to the Court by Section 25 is a very wide one, and if there is no doubt as to the veracity of the will, there are three things only that cannot be remedied by Section 25: The testator, two witnesses, and a document in writing.

In contrast, in one case the Supreme Court allowed an appeal from the confirmation of a will whose two pages were typed by different typewriters. It was held that that raised sufficient doubt as to exclude the operation of section 25.[106] In other cases section 25 has received an even stricter interpretation. In commenting on one such case, one of our correspondents stated:[107]

> In Civil Appeal 679/76 the deceased had instructed his banker to open a joint account in the names of himself and another person, who was now the appellant. This appellant wanted the instruction to the bank to be construed as a kind of will, and he tried to rely on Section 25. The Supreme Court, dismissing the appeal, ruled that Section 25 comes to remedy defects in a will which was lawfully made, but does not create a new way to make a will.

Israeli experience with the provision has therefore been mixed. In particular, it does not yet appear to have been finally established whether section 25 can be called in aid only in respect of wills where there has been at least some attempt to comply with the *Wills Act* formalities. Although any legal analysis of the Israeli law is somewhat difficult owing to the lack of source material and the necessity of relying on the opinions of our correspondents, it would appear that Civil Appeal 679/76 is not necessarily inconsistent with *Briel* v. *The Attorney-General*, as in the former case the threshold requirements set out in *Briel* were not satisfied because the instructions to the bank were unwitnessed.

Qualitative assessments of section 25 vary. One commentator suggested that the majority of applications are rejected owing to the requirement that the genuineness of the will must be established before the court can exercise its discretion.[108] Less pessimistic are the comments of an Israeli judge who wrote to us in response to an inquiry whether the provision had made the law less certain and impeded the administration of estates. He stated:

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[105] Translation of case supplied by Dr. F. S. Perles, *supra* n. 102.

[106] *Supra* n. 102.

[107] *Ibid.*

[108] Letter from Professor Uriel Reichman, Tel-Aviv University to Professor J. Langbein, July 26, 1979, copy on file at Law Reform Commission of British Columbia.

> [T]he law is definitely not "less certain" . . . The provisions of s. 25 do not tend to "increase litigation, expense and delay." On the very contrary it has been my experience that Advocates are gradually attaching less and less importance to defects in the form of a will since they are aware of the Court's approach, and will not oppose probate merely on grounds of such defects. I am, therefore, of opinion that s. 25 actually prevents a great deal of unnecessary litigation and saves time and expense in cases before the Court. Its effect is to limit the battleground to issues which would be the foremost if not the only ones, i.e. to the question: Is the will a true expression of the testator's intent?
>
> Court statistics do not reveal the frequency of invocation of s. 25 in applications before the Court. Every contested will comes before a District Court Judge. The reasons for opposing a will are not always based on adequate legal grounds for such opposition. Dissatisfied parties will often file an opposition on the most slender legal grounds, sometimes even only with a view to extracting some benefits from the beneficiares by moral pressure. In such cases every possible point will be taken and no trifling deviation from prescribed procedure will be overlooked. However, when the case comes up for hearing all unwarranted pleas as to form melt away mostly even before the Court pronounces on them. Section 25 is like a sword. Its very presence suffices and it has rarely to be unsheathed.

On balance, the Israeli experience is encouraging.

(v) Manitoba

Subsequent to the release of our Working Paper No. 28, in which we proposed the enactment of a dispensing power in British Columbia, the Law Reform Commission of Manitoba released a Report on the Wills Act and the Doctrine of Substantial Compliance.[109] They recommended that:

> 1. A remedial provision should be introduced in "*The Wills Act*" allowing the probate courts in Manitoba to admit a document to probate despite a defect in form, if it is proved on the balance of probabilities, that the document embodies the testamentary intent of the deceased person.
> 2. The provision should be worded so as to apply to defects in execution, alteration and revocation.
> 3. A further section should be enacted to allow the probate court to save a gift to a beneficiary who has signed for the testator or as a witness to a will, where the court is satisfied that no improper or undue influence was employed.

This proposal is limited to defects in a "document." It is likely that it was intended that "document" be restricted to written embodiments of testamentary intent, although the possibility that "document" might be read to include means of storing information as diverse as videotape or floppy disk was not considered.

This recommendation if implemented would vest a very broad discretion in the court. The only threshold requirement is apparently that the testamentary wishes must be in the form of a "document." The exercise of the power is, moreover, not contingent upon substantial compliance.

(vi) England

In a consultative document released in 1977 the English Law Reform Committee solicited comment on the possibility of introducing a "general dispensing power" into the English *Wills Act*.[110] However, in their 22nd report, issued in 1980, that option was rejected:[111]

> While the idea of a dispensing power has attractions, most of us were more impressed by the argument against it, namely that by making it less certain whether or not an informally executed will is capable of being admitted to

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[109] September 8, 1980, Report No. 43.

[110] The Law Reform Committee, Consultative Document on The Making and Revocation of Wills, 1977 at 6.

[111] May 1980, Cmnd. 7902 at 3. For a critique of their recommendations, *see The Making and Revocation of Wills—I*, (1981) 125 Sol. J. 263.

> probate, it could lead to litigation, expense and delay, often in cases where it could least be afforded, for it is the home-made wills which most often go wrong. . . . We think that an attempt to cure the tiny minority of cases where things go wrong in this way might create more problems than it would solve and we have therefore concluded that a general dispensing power should not be introduced into our law of succession.

The English Committee went on to advocate certain limited reforms designed to relax the execution requirements contained in the English Wills Act.

3. A DISPENSING POWER FOR BRITISH COLUMBIA

(a) *Issues Bearing on the Introduction of a Dispensing Power*

(i) *Will the Provision Result in a Multiplicity of Forms of Wills?*

An argument can be made that the problems associated with testamentary documents which existed in England prior to the formalities imposed in 1837 would be revived by the introduction of a remedial power. The *Wills Act, 1837* was designed to reduce the volume of estate-related litigation and to provide a means of readily identifying a document as a will. In fact, the South Australian provision has been criticized as being so broadly drafted as to extend to every citizen the right to make a privileged will.[112]

A number of our correspondents expressed some concern that the introduction of a dispensing power would result in a certain amount of confusion about the form a will must take to be valid. One correspondent noted:

> The Wills Act formalities have introduced the necessary self-discipline into the making of wills, if I may put it that way. My fear is that the proposals . . . will lead to the dissipation of that self-discipline, the belief that one can do it one's self will grow apace, and the volume of litigation will grow also. When I think of the serious attitudes of those groups to which I speak about will-making, and their desires "to get it right", and I compare that attitude with the easy and ambiguous way in which they write letters to their relatives and their friends, I find my concern put in a nutshell.

This is perhaps the most difficult argument to overcome for proponents of a dispensing power. It can be met partially by imposing mandatory threshold requirements, as in Israel, or by imposing an onerous burden of proof. The South Australian provision requires that the court be satisfied beyond a reasonable doubt that the document was intended by the testator to be his will. In the *Graham* case referred to previously, Jacobs J. was of the opinion that this requirement imposed some limits on the permissible form, but was loathe to specify them. He felt that the greater the departure from the requirements of the statute, then the harder it would be for the court to reach the required degree of satisfaction.

Whether this objection is practical is open to question. Even where a court may exercise a dispensing power, a premium is still placed upon executing a will in the traditional form. Such a document is instantly recognizable as a will and would generally be admitted to probate without the need for proof in solemn form. For this reason we expect that the vast majority of wills will continue to be executed in the traditional form. Both the South Australian and Israeli experience bear this out. The Manitoba Law Reform Commission noted:[113]

> It is argued that introduction of such a provision would discourage the use of the proper formalities thereby impairing performance of all the valuable functions. It is submitted that this argument is flawed. The provision recommended is a remedial provision. It will be used only at final stages to save a will which is defectively executed, revoked or altered. The doctrine is not applicable at initial

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[112] Palk, Simon N.L., *Informal Wills: From Soldiers to Citizens*, (1976) Adel. L. Rev. 382.

[113] Report on *The Wills Act* and the Doctrine of Substantial Compliance, 1980, No. 43 at 19-20.

> stages of execution. Reliance on it at that stage would mean subjecting an estate to needless litigation. A remedial provision should not discourage or in any way affect the use of formalities.

(ii) Will the Result be Increased Litigation Due to the Possibility of Numerous Contending Testamentary Documents?

At the time of the introduction of the South Australian provision, a prediction was made that the floodgates of litigation would be opened. This has not in fact occurred in Australia and only one case involving the remedial provision has been reported. Our Israeli correspondents have also indicated that there has not been a significant increase in the number of contested wills. In fact, one of our correspondents expressed the view that litigation has been reduced due to the unprofitability of taking technical formal objections.

It is undeniable that a dispensing power does increase the possibility that competing testamentary instruments may be produced for probate. However, we are not convinced that such conflicts will arise often enough to constitute a serious drawback. Moreover, where a personal representative is faced with a number of documents which could be construed as having testamentary effect, and concludes that he should not propound any particular document, it is open to him or to a person who alleges that the rejected document is valid as a will, to issue a citation to propound an alleged will under Rule 61 (45) of the 1976 Rules of Court. That rule provides:

> (45) (a) Where there is or may be a document which may be alleged to be a will of a deceased person, a citation to propound the document as a will may be issued by any person interested.
>
> (b) The citation shall be in Form 76 and shall be supported by affidavit and shall be directed to the executor and any other person named in the document.
>
> (c) An answer shall be in Form 77.

Where an answer is entered to such a citation, the validity of the document will be litigated.

There appears to be no authority, however, concerning the effect of a grant of probate made in default of an answer by those cited. The sanction contemplated by the rule itself is the issuance of probate without regard to the document in respect of which the citation issued. Upon the issuance of such probate, the executor is entitled to act upon the grant unless and until it is revoked.[114] Even if a person who failed to answer a citation is able to satisfy what would probably be the onerous burden of displacing the prior will, it is likely that any claims he may raise against the executor or beneficiaries under the first will would be defeated by laches, estoppel, or the defence of change of position. In any event the whole question of the effect of the revocation of a grant of letters probate at the instance of a person who fails to propound a will when cited to do so is one which can also arise under the current law, and the enactment of a remedial provision does not therefore give rise to any new problems.

On balance we feel that the remedies available to an executor who questions the effect of any document, and the protection offered to him by law, strike an adequate balance between the flexibility offered by a dispensing power and the executor's need to have some basis upon which to assess his position. As one of our correspondents noted:

> The obvious argument against the proposal is that it would encourage both fraud and litigation. As I said above, I do not think the opportunity for fraud would be any greater than it is at present. I think the fact that in the case of suspicious circumstances the onus of proving that the testator knew and approved of the

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[114] See *Kerr* v. *McLennan*, (1875) 9 N.S.R. 502 (C.A.). It was regarded as a judgment *in rem* in *Irwin* v. *Bank of Montreal*, (1876) 38 U.C.Q.B. 375; see *Book* v. *Book*, (1887) 15 O.R. 119.

contents of the will is on the propounder is as great, if not a greater protection against fraud, than are the present formalities. It is true that there may be more litigation. But it will also be true that the testator's intention will be less often defeated, and that is a result worth paying for.

(iii) *Will the Provision Result in Undue Delay in the Administration of Estates?*

Such a delay might arise, for example, where beneficiaries must await the result of a contested probate action before receiving their interests under the intestacy. If another will is in existence, distribution must await the court's decision on the validity of a faulty will executed after a formally valid will.

On the other hand, such a delay can be justified on the grounds that it would provide an opportunity to give effect to the testator's intentions. Distribution of estates in British Columbia is already postponed for six months in order to permit applications to be made under the *Wills Variation Act*. The granting of a dispensing power to the court would not likely extend this period significantly, if at all. Even if it does, we think that the execution of the testator's actual intent is a more important consideration.

(iv) *Are There Other Superior Methods of Accomplishing the Same Ends?*

The granting of a dispensing power to the Supreme Court is not the only method of giving effect to the imperfectly expressed wishes of a testator. As we pointed out earlier, one could adopt the approach of reducing the number and type of formalities required. In addition, Professor Langbein has called on courts in the United States to develop their own "doctrine of substantial compliance" apart from legislation.[115] It is likely that Canadian courts would be very reluctant to develop such a doctrine without authorizing legislation. We have already outlined our objections to both these courses. Merely amending the formalities or relaxing the rule of strict compliance would not remedy the injustice created by the rejection of a document which although it does not meet the new formalities, nevertheless expresses the testator's true intent.

(v) *Will a Dispensing Power Prevent the Frustration of Testamentary Intent?*

The primary argument advanced in favour of a dispensing power is that it allows the court to give effect to a testator's wishes when it is certain that the document is meant to be the last will of the deceased. The failure of a testator to comply with the requirements of the *Wills Act* occasionally leads to a court expressing regret that it must reject a will on a technical point, since the court also finds that the document represented the true wishes of the testator. A dispensing power would provide the court with a back-stop to prevent the sort of injustice which can occur when a genuine will must be rejected.

We feel that no policy ground save that of convenience is served by rejecting a will which undoubtedly expresses the testator's true intent, and on balance find the argument based on convenience unconvincing. Although a study of probate procedure is beyond the scope of this paper, it is perfectly possible to devise a scheme which will make the task of a person propounding a faulty will easier. Under the current Supreme Court Rules, for example, an executor or administrator with or without will annexed is already obliged under Rule 61 (3) to swear an affidavit in form 66, 67 or 68. The latter two forms require the deponent to set out either his belief that the document represents the last will of the deceased, or alternatively that despite a diligent search, no will was found. It would not be a large step for him to also have to set out the circumstances in which the will came to be defectively executed. Alternatively, the rules could provide that certain types of informal wills (e.g. holograph wills) should be admitted as a matter of course upon conditions. Such conditions might include the filing of affidavits concerning the genuineness of the handwriting. Later in this chapter we shall canvass a number of possible approaches to probating technically defective wills.

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[115] Langbein, The Crumbling of the Wills Act, *supra* n. 92.

(vi) Will Uncertainty be Increased or Reduced?

As Professor Langbein points out, it is difficult to predict when the equities of a particular case will induce a court to try to avoid formal requirements. He notes that the strict compliance rule has achieved, what is in many respects, the worst of both worlds. When it is enforced unjust harshness may result, and when it is not, it may be as a result of judicial artifice.[116] The Israeli experience suggests that a dispensing power may reduce uncertainty by clarifying the issues between parties to a dispute. Many attacks on form are motivated not by any suspicion that the will does not represent the testator's true intent, but rather because the person challenging the will does not like its substantive provisions. The existence of a dispensing power forces the parties to litigate the real issues between them, and thereby simplifies proceedings.

(b) The Scope of a Remedial Power

An essential element of any decision to provide the court with a jurisdiction to admit wills to probate under a dispensing power is the scope of the power which the court may exercise. Must there be an attempted compliance with the *Wills Act*? A court could be restricted to remedying those wills executed under circumstances in which the testator had substantially complied with the Act. Thus a signature in the wrong position would not necessarily lead to the invalidity of the will.

In Professor Langbein's view the courts should as a matter of law require only substantial compliance with formal requirements. This presumes some attempt to comply with the requisite forms. The exact nature of any attempts to comply with formal requirements which would satisfy the "substantial compliance" doctrine is a question for argument. It would appear that Israeli law adopts this limited scope for its dispensing power; at least one court having held that there must have been some compliance with the Israeli *Wills Act*.

On the other hand, a broader dispensing power could be given to the court. Such a provision would not be restricted to cases where the testator had "substantially complied" with the formalities. It is this approach which has been adopted in South Australia. The statute provides that a testamentary document may be deemed to be the will of a deceased if the court is satisfied beyond a reasonable doubt that the testator meant the document to be his will. The language of the legislation is broad enough to permit the court to admit a will to probate although no attempt is made to comply with the statute.

We are of the opinion that the Supreme Court of British Columbia should be given the power to admit a will to probate notwithstanding that no attempt has been made by the testator to comply with the *Wills Act*, as long as the court is satisfied that the deceased intended the document to constitute his will.

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[116] *Ibid.*

(c) Threshold Requirements

(i) Generally

Although we have concluded that as a general rule, effect should be given to a testamentary instrument which undoubtedly embodies the testator's true intent, we are also firmly of the view that a general dispensing power may be cast too broadly. Certain forms of testamentary dispositions are so inherently suspicious that the benefits which might be derived from admitting them to probate are clearly outweighed by the inevitability of litigation and the probability of confusion. At the same time, if the law is to be perceived as arriving at defensible results, it must correspond to public expectations. Wills have always been regarded as documents particularly vulnerable to fraud, and hence the formalities of execution have been particularly onerous. The recognition that the application of these formal requirements is not justified in every case does not lead to the inevitable conclusion that every alleged embodiment of testamentary intent should be admissible to probate. Wills are generally recognized to be important documents. We therefore think it appropriate that the law recognize their special status by setting out certain threshold requirements for the invocation of a dispensing power.

We are of the view that the general public recognizes that most important documents should be evidenced in writing, and signed. At the same time, the law has traditionally regarded unusual circumstances surrounding the execution of a will with suspicion, and this view probably reflects a genuine public concern that suspicious wills be closely scrutinized. This suggests three possible threshold requirements — writing, a signature, and an onerous burden of proof.

(ii) Writing

We are of the view that no embodiment of testamentary intent should be admissible to probate unless it is in writing. We would not limit our recommendation to handwritten documents. We prefer to leave the question of wills otherwise reproduced to individual cases, rather than formulating a general rule. Earlier in this report we noted that in some jurisdictions which adopt holograph wills, controversy has arisen whether a holograph will need be wholly in the testator's handwriting, or whether such a will is admissible if only its material parts are handwritten. We wish to avoid this controversy completely. While handwriting itself may be a valuable indicator of the writer's identity, that in itself does not justify refusing probate to a will adequately proven by other evidence.

In recent years modern technology has brought methods of storing data, undreamt of by the draftsman of the *Wills Act, 1837*, well within the reach of the average testator. Home computers, tape recorders and videotape recorders, while not ubiquitous, are easily accessible. Should a testator be able to videotape his wills, or to program his computer to reproduce his will on its screen at a given command?

The provisions of the *Wills Act* and the *Interpretation Act*, when read together, leave open the possibility that a will may be probated even though the "writing" consists of images mechanically or electronically reproduced. "Writing" is defined in section 29 of the *Interpretation Act* as follows:

> "writing," "written" or a term of similar import includes words printed, typewritten, painted, engraved, lithographed, photographed or represented or reproduced by any mode of representing or reproducing words in visible form.

The inherent limitation in this definition is that the words be reproduced "in visible form." This would, for example, rule out videotapes, tape recordings and various devices (e.g. floppy disks, programming cards) used program computers, which in turn reproduce the words on a television scree or machine written copy. Although the end product of videotapes or flopp disks may be legible on a screen, the words themselves cannot be executed b the testator as required by sections 4 and 6 of the *Wills Act*, and by ou recommendation. The floppy disc or videotape may be signed, but the word of the will, although reproduced on the tape or disc, are not in visible form The tape or disc would not therefore constitute the "writing" required by th *Wills Act*, section 3, or the "writing" which must be signed under ou recommendation.

One novel form of will is arguably sanctioned by section 29 of the *Interpretation Act*. It would be possible to prepare a filmed will using animated letters and words. The words on the film would be in visible form without the intervention of any electronic or mechanical device, although the use of a projector would make viewing easier. The testator could then sign the film at its end, together with the two witnesses required by section 4.

Although it is possible to foresee that in a relatively short period of time, storing wills electronically, or on tape, may be advantageous, we have concluded that provision for such wills in a modern *Wills Act* would be premature. We are advised that the detection of tampering with electronic means of storing information would likely be a lengthy and expensive process, and that experts qualified to testify on such matters would not be readily accessible to executors in British Columbia. Moreover, the electronic storage and transmission of data is a rapidly changing field of technology, and for that reason we are not prepared to attempt to identify any new and acceptable medium for recording testamentary intentions. We therefore make no recommendation to expand the definition of "writing."

(iii) Signature

In the Working Paper we proposed, as a threshold requirement, that the document bear the testator's signature. Most people would readily accept the notion that affixing one's signature to a document is the usual means of approving and adopting its contents. We have concluded that the dispensing power we propose for British Columbia should require that the document be signed.

This aspect of our proposal attracted some comment from the Manitoba Law Reform Commission. They stated:[117]

> The British Columbia approach is beneficial in that it is broader than the Queensland approach and it does cover most of the difficulties currently encountered. Yet, circumstances can still be envisioned where strict adherence to even these minimal formalities could defeat the testator's intention. As Prof. Langbein points out what of the testator who is about to sign his will in front of witnesses, when an "interloper's bullet or a coronary seizure fells him". The likelihood of such an occurrence is small but the fact remains there is no necessity for such limitations to the proposed section. In effect such requirements do not conform with the functional analysis on which the remedial provision is based. For this reason such a limitation is not recommendable.

We are not of the view that the possibility of an interloper's bullet, or other similar and equally unlikely possibilities warrant the deletion of the requirement of a signature. We find more persuasive the case of a careful testator who, in striving to keep his testamentary dispositions up to date, writes out several alternative drafts. He decides in the end not to change his will, but retains his final draft for future reference. It is, of course, unsigned, and is found at his death among his papers. Is it valid or not? The inevitable result must be litigation. As we are convinced that this situation is many times more likely than that which worried the Manitoba Commission, we have concluded that insisting on a signature is a valuable safeguard which will prevent injustice, confusion and unnecessary expense far more often than it will cause hardship.

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[117] *Supra* n. 113 at 19-20.

We are not swayed by the argument that such a requirement "does not conform with the functional analysis." In fact, we believe quite the opposite. We acknowledge that formality has some purpose. Here the requirement of a signature performs a valuable channelling and evidentiary function. The point of introducing a dispensing power is to temper the arbitrariness with which rules respecting formalities have been applied, and not to deny the general desirability of formalities. We have simply concluded that the harm which would ensue from relaxing this particular requirement outweighs any benefit which would accrue from its abolition. In short, far from abandoning any functional analysis, in our view adopting the requirement of a signature recognizes that in some respects formalities serve a valuable function. It restricts the application of a dispensing power to documents which are most likely to represent attempts to communicate a settled testamentary intent.

In recommendation 4, we proposed that a general provision respecting signature by a person acting at the testator's direction should be enacted. We see no reason why this provision should not apply equally to a testator's signature on an informal will.

(iv) Burden of Proof

The South Australian provision requiring proof beyond a reasonable doubt raises the issue of whether a similar requirement should be imported into British Columbia law. We have concluded that the standard of proof should be the civil litigation standard of proof on the balance of probabilities. It is this standard which generally applies in probate matters.

A consideration in arriving at such a conclusion was the fact that the civil litigation standard is not itself immutable. In a lawsuit "proof" is inextricably intertwined with "belief", and the readiness of a court to be persuaded of the existence of a certain state of affairs will depend upon factors other than the mere mechanical weighing up of evidence. The point was put by Dixon J. in *Briginshaw* v. *Briginshaw*[118] as follows:

> The truth is that, when the law requires the proof of any fact, the tribunal must feel an actual persuasion of its occurrence or existence before it can be found. It cannot be found as a result of a mere mechanical comparison of probabilities independently of any belief in its reality. No doubt an opinion that a state of facts exists may be held according to indefinite gradations of certainty; and this has led to attempts to define exactly the certainty required by the law for various purposes. Fortunately, however, at common law no third standard of persuasion was definitely developed. Except upon criminal issues to be proved by the prosecution, it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal. But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters 'reasonable satisfaction' should not be produced by inexact proofs, indefinite testimony, or indirect inferences.

It has long been held that where the circumstances surrounding the execution of a will give rise to a suspicion that it may not represent the testator's true intent, a burden is placed upon the person propounding the will to dispel that suspicion by affirmative evidence. It is likely that the problem of determining testamentary intent where a document is defectively executed will be treated similarly. The cases respecting the dispelling of a suspicion establish that although the burden is only to establish testamentary intent on the balance of probabilities, the court will closely scrutinize the evidence before deciding to act upon it. In *Re Martin; MacGregor* v. *Ryan*[119] Ritchie J. held *per curia*:

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[118] (1938) 60 C.L.R. 336.

> Counsel for the appellant contended that in all cases where the circumstances surrounding the preparation or execution of the will give rise to a suspicion, the burden lying on the proponents of that will to show that it was the testator's free act is an unusually heavy one, but it would be a mistake, in my view, to treat all such cases as if they called for the meeting of some standard of proof of a more than ordinarily onerous character. The extent of the proof required is proportionate to the gravity of the suspicion and the degree of suspicion varies with the circumstances of each case. It is true that there are expressions in some of the judgments to which I have referred which are capable of being construed as meaning that a particularly heavy burden lies upon the proponents in all such cases, but in my view nothing which has been said should be taken to have established the requirements of a higher degree of proof.

There can be no closed list of circumstances which will cause the court to scrutinize the evidence jealously. The less the document resembles a standard will, the stricter the proof that will be required. Where the will contains unusual types of dispositions, or legatees whose inclusion as objects of the testator's bounty is unexpected, the court's suspicion may be aroused. Undoubtedly the court will also be concerned with the physical condition of the will, and in the case of informal documents such as letters, any recital of unusual facts may make it more difficult to establish the requisite testamentary intent.

(d) Transition

We think it important to specify that a dispensing power should apply only to documents signed by a testator who died after the legislation implementing our recommendation comes into force. Otherwise, it is possible that executors and beneficiaries who have acted in reliance on the invalidity of an informal or defectively executed document would be prejudiced. We do not wish to create a retroactive right to seek probate of an informal will where letters of administration or a grant of letters probate have already issued.

(e) Recommendation

The Commission recommends that:

5. The Wills Act *be amended by adding a section comparable to the following:*

Dispensing Power

Notwithstanding section 4, a document is valid as a will if

(a) it is in writing,

(b) it is signed by the testator,

(c) the testator dies after this section comes into force,

and the court is satisfied that the testator knew and approved of the contents of the will and intended it to have testamentary effect.

6. The definition of "will" contained in section 1 of the Wills Act *be amended to include a document valid as a will under Recommendation 5.*

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[119] [1965] S.C.R. 757.

(f) The Probate of Informal Wills

Some of our correspondents were concerned that a dispensing power such as we recommend could unduly lengthen probate proceedings. Although we have concluded that the general beneficial effects of a dispensing power warrant running this risk, we are concerned that, where possible, measures be taken to minimize expense and litigation.

Under our recommendation, a number of documents may be tendered for probate. Some will be the holograph wills, i.e., wholly in the handwriting of the testator, and unwitnessed. Others may be partially printed or typed, and partially handwritten. In other cases, it may be contended that a series of letters constitute a "will." Some of these forms will obviously cause fewer problems than others. Holograph wills are probated expeditiously in other jurisdictions without undue difficulty, and it would be possible to stipulate, for example, that a will entirely in the handwriting of the testator and signed by him should be admitted to probate in British Columbia in common form, while other informal wills would have to be probated in solemn form.

In Alberta, holograph wills are probated in common form in the same fashion as formal wills. Proof of execution is by affidavit. Rule 10 (5) of the Alberta *Surrogate Rules* states:

> When a holograph will is presented for probate or with an application for administration with will annexed the applicant shall submit proof of execution thereof in Form 12 or in such other form as the judge may require to satisfy him that the entire will, including the signature thereto, is in the proper handwriting of the deceased.

Form 12 provides:

AFFIDAVIT PROVING EXECUTION OF A HOLOGRAPH WILL

In the Surrogate Court of .... Alberta.

Judicial District of ....

In the estate of .... deceased.

I, C.D. of the .... of ....

in the .... of ....

(occupation)

make oath and say:

1. That I knew the said deceased in his lifetime and was present and did see the said deceased write and sign with his own hand the paper writing hereunto annexed and marked as Exhibit "A" to this my affidavit.

or

2. That I knew and was well acquainted with the said deceased for many years before and down to the time of this death and that during such period I have frequently seen him write and also subscribe his name to documents whereby I have become well acquainted with his handwriting and have now carefully perused and inspected the paper writing hereunto annexed and marked Exhibit "A" to this my Affidavit which purports to be and contain the last will and testament of the deceased and bearing date .... and subscribed thus ....

3. That I verily believe the whole of the will together with the signature .... subscribed thereto to be of the true and proper handwriting of the deceased.

Sworn before me at the ....

.... of ....

in the Province of ....

this .... day of ....

....

A Commissioner for Oaths

In Manitoba, the Surrogate Court Rules also provide that holograph wills are generally admitted to probate in the same fashion as formal wills. Rule 39 (5) of the Surrogate Court Rules provides:

> **Evidence as to holograph will.**
>
> **39 (5)** Upon application for probate or administration with will annexed of a holograph will, evidence shall be given satisfactory to the judge
>
> (a) as to the handwriting and signature of the testator, and that the entire will is wholly in the handwriting of the testator; and
>
> (b) as to the validity of the will, including evidence that
>
> (i) at the time or apparent time of the signing of the will, the testator was of the full age of eighteen years; and
>
> (ii) at or about that time or apparent time, he appeared to be of sound mind, memory, and understanding.

Similar provisions might be adopted in British Columbia. However, in our Working Paper we did not canvass the manner in which informal wills should be probated, and for that reason we do not feel it appropriate to make a recommendation in this Report. In a later Report, we hope to examine probate procedure and administration, and the possibility of singling out certain forms of informal wills for probate in common form might usefully be discussed in that context.

G. International Form of Wills

1. THE CONVENTION

In 1961, the Council of the International Institute for the Unification of Private Law (Unidroit) established a Committee to consider a standard form for an international will.[120] The Committee sought to remedy the problems that arise in private international law concerning the formal validity of wills. As a result of that Committee's work a Diplomatic Conference was held in Washington, D.C. in 1973 at which a Convention Making Provision for a Uniform Law on the Form of an International Will ("the Convention") was approved.[121] We reproduce this Convention in Appendix C.

The Government of Canada acceded to the Convention early in 1977,[122] and it came into force on February 9, 1978.[123] By the end of 1978 five nations had acceded to and were bound by the Convention.[124] Thirteen other nations have signed but not ratified the Convention, and hence it is not yet in force in those countries.[125] In Canada the Convention is in effect in four provinces: Alberta,[126] Newfoundland,[127] Manitoba,[128] and Ontario.[129]

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[120] For detailed histories of the development of the Convention, *see* the Ontario Law Reform Commission Report on the International Convention Providing a Uniform Law on the Form of the International Will, 1974 (the Ontario Report) the Manitoba Law Reform Commission Report on An International Form of Will for Manitobans, 1974 (the Manitoba Report); and the following articles: Nadelmann, Kurt H., *The Formal Validity of Wills and the Washington Convention 1973 Providing the Form of an International Will* (1974) 22 Am. J. Comp. L., 365; Curtis, Jerome J., *The Convention on International Wills: A Reply to Kurt Nadelmann*, 23 Am. J. Comp. L., 119; Thomas, Paul, *A Uniform Law on the form of an International Will*, 3 Dalhousie L.J. 295; Wallman, Richard, *Recent Unidroit Drafts on the International Will* (1973) Int. Law., 205; *Convention Providing a Uniform Law on the Form of an International Will: Problems with State Probate Law*, (1977) 4 Ga. J. Int. & Comp. L., 422.

[121] The Convention is appended to this Report as Appendix C and the Uniform International Wills Law is found in Appendix D.

[122] By Order in Council P.C. 1976-3094 of December 16, 1976. The declaration provided that:

(a) The Government of Canada declares that pursuant to Article XIV of the Convention, the Convention shall extend only to the Provinces of Manitoba and Newfoundland.

(b) The Government of Canada further declares that it will submit, at any time after accession, other declarations, in conformity with Article XIV of the Convention, stating expressly the additional provinces to which the Convention shall extend, when such provinces have enacted the necessary implementing legislation.

The instrument of accession was deposited by Canada on January 24, 1977.

[123] It should be noted that the Convention, by its own terms, is not effective until a further six months after the declaration of effectiveness as to any province is made by the Government of Canada (Article XIII).

[124] The five states are Canada, Libya, Niger, Portugal and Yugoslavia.

The term "international will" refers to a will executed in the form required by the Convention. It is not necessary that such a will have an international component, or that it take effect in several countries. An international will is quite appropriate even if the testator, at the time the will is made, has no foreign assets and no connection with a foreign country.

The Convention does not provide a standard form of will. Instead, it specifies a procedure for executing wills acceptable to both civil and common law jurisdictions.[130] If the requirements of the Convention are adhered to, then the will is formally valid in all acceding states.

The Convention does not attempt to regulate the internal law of an acceding state. A will formally valid in British Columbia under our *Wills Act* will continue to be valid in British Columbia, even if in breach of the mandatory articles of the Convention. The Convention does not displace existing law. In addition, if the will would be valid as to form and admissible to Probate under the current conflict rules governing formality, it could be probated even if invalid as an International Will. The major purpose of the Convention is to permit a legal advisor to draw a will undoubtedly valid in point of form in any state which has acceded to the Convention, without reference to that state's domestic or conflict rules concerning will formalities.

The execution requirements specified in both the Convention and the Uniform International Wills Law are relatively straightforward. The provisions are drafted so as not to offend either civil law or common law jurisdictions. Generally, the requirement for witnesses parallels the common law, while the requirement that a person authorized to act in connection with international wills certify certain crucial facts not only provides a guarantee as to the identity of the testator, but supplies the notarial witness required by some civil law jurisdictions.

Recommending its implementation in their Province, the Manitoba Law Reform Commission commented as follows:[131]

> Insofar as the present practice of making wills is concerned, the additional formalities required for an international will are not very burdensome at all. If implementation and ratification were to be effected in Manitoba, one might foresee that most of our people's wills would be executed in international form as a matter of course, for the sheer utility and flexibility of obtaining international validity as to form.

The Convention sets out matters of international agreement, implementation, recognition of form and obligations of the depository government. The Uniform International Wills Law annexed to the Convention provides for the required formalities of execution as well as the form of certificate which the authorized person must execute. Since the form of an international will differs little from the form in common use in British Columbia, the simplest method of describing the requisite procedure under the Convention is to list the additional steps which must be taken to validate an international will:

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[125] Belgium, People's Republic of China, Czechoslovakia, Ecuador, France, the Holy See, Iran, Lao People's Democratic Republic, Sierra Leone, the Union of Soviet Socialist Republics, the United Kingdom, Northern Ireland and the U.S.A.

[126] *The Attorney-General Statutes Amendment Act*, S.A. 1976, c. 57, s. 8. The effective date for Alberta was December 1, 1978.

[127] *The Wills (Amendment) Act*, S.N. 1975-76, c. 23. The effective date for Newfoundland was February 9, 1978.

[128] *An Act to Amend the Wills Act*, S.M. 1975, c. 6. The effective date for Manitoba was February 9, 1978.

[129] *The Succession Law Reform Act*, S.O. 1977, c. 40, s. 42. The effective date in Ontario was September 15, 1978.

[130] The Convention, however, does require a standard form of certificate to be completed.

[131] Manitoba Law Reform Commission, supra n. 120 at 4.

(a) Each page of the will must be numbered and signed by the testator;[132]

(b) In addition to the two witnesses, an "authorized person", must be present and certify in writing that a number of the formalities have been met. The certificate must be attached to the will and a copy given to the testator;[133]

(c) The witnesses, testator and authorized person should all be present at the same time when placing their signatures on the will;[134]

(d) The testator must make a declaration in the presence of the witnesses and authorized person that the document is his will and that he knows the contents.[135]

(e) The authorized person must note on the will the date and the reason for a testator being unable to sign, if that is the case. He must also ask the testator if the will should be placed in safekeeping.[136]

The additional requirements to be met on the execution of an international will are not complex. A slight modification to normal law office procedures to take these extra requirements into account would not be onerous. It should be noted, however, that the Convention does not apply to joint wills.[137]

There are a number of ambiguities inherent in the Convention. It is not clear, for example, which provisions are mandatory such that a breach will render the will ineffective as an international will, and which are merely directory, such that a breach does not deprive a document of the benefit of the Convention. For example, Article 11 of the Annex to the Convention requires the authorized person to retain a copy of the certificate. It is difficult to argue that the failure to comply with this provision should invalidate the will as an international will. On the other hand, Article 6 (2) requires the testator to sign and number each page of the will. It is likely that a breach of this provision would deprive the will of the benefit of the Convention.

The drafting of the Convention gives rise to some difficulties. Article V provides:

> In the presence of witnesses and of the authorized person, the testator shall sign the will or, if he has previously signed it shall acknowledge his signature . . . The witnesses and the authorized person shall there and then attest the will by signing in the presence of the testator.

Opinion is divided over the meaning of the words "shall there and then attest." The Ontario and Manitoba Law Reform Commissions have suggested that it requires all signatories to sign in the presence of each other.[138] On the other hand, an American commentator has concluded that although the testator's presence is required, the witnesses and the authorized person do not have to sign in each other's presence:[139]

> The requirement that the witnesses and the authorized person attest "there and then" may be tantamount to requiring them to sign in each other's presence but this interpretation is doubtful in view of the express requirement that they sign in

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[132] International Uniform Wills Law, Article 5(2), Appendix D, *infra*. If the testator is unable to sign then the signatures can be made by the person signing on his behalf or if none, the authorized person is to sign.

[133] *Ibid*. Articles 4 and 9.

[134] *Ibid*. Article 5 (1), 5 (3).

[135] *Ibid*. Article 4 (1).

[136] *Ibid*. Articles 7 (2), 5 (2) and 8.

[137] *Ibid*. Article 2. (A joint will is one made by at least two persons, contained in a single document and executed by each testator. It is not recognized as a single will but is in effect two wills.)

[138] The Ontario Law Reform Commission Report *supra* n. 120 at 13; and the Manitoba Law Reform Commission Report, *supra* n. 120 at 19.

[139] Curtis, *supra* n. 120 at 123.

> the presence of the testator without a like express requirement that they sign in each other's presence.

The rules respecting revocation of International wills are a third source of ambiguity. The Convention provides in Article 14 that:

> The International will shall be subject to the ordinary rules of revocation of wills.

The Convention does not stipulate which jurisdiction's ordinary rules are to apply. It could be interpreted as requiring that the *lex loci actus*, or the law of the place where the will was made, be applied to govern revocation. Such a throwback to medieval conceptions of the rules governing such conflicts of law was probably not intended by those who drafted the Convention. Rather, it would appear that Article 14 preserves the common law conflict rules concerning revocation of wills, a matter dealt with later in this Report.

These ambiguities are the result of international compromise in negotiating the Convention. On the whole, they are not sufficiently important to warrant rejection of international wills. A Canadian author has recently pointed out that the success of the Convention ultimately depends on its international acceptance and easy availability throughout the world:[140]

> Though there is some obscurity in the Convention and Uniform Law, this would not seem to derogate from the overall design of the scheme. It is to be hoped that the Convention will be widely adopted, for it is clear that the benefit to be derived from the notion of the 'international will' is dependent entirely on the number of jurisdictions ratifying or acceding to the Convention. If there is wide acceptance of the Convention then the scheme should provide a boon to Canadians living, travelling or having property abroad, and indeed to immigrants and emigrants. The required formalities for 'international wills' are not too far removed from the requirements of 'formal' domestic wills, and it could transpire that sometime in the future most Canadians would execute their wills in international form thus gaining immediate international formal validity.

We are of the opinion that the privilege of making an "international will" may be of considerable value to British Columbians. In view of the increasing mobility of the general populace it would be advantageous to have a form of will undoubtedly valid regardless of the effect of British Columbia choice of law rules.

The Commission recommends that:

7. The Convention Providing a Uniform Law on the Form of an International Will should be adopted in British Columbia.

2. THE MECHANICS OF INTRODUCING INTERNATIONAL WILLS INTO BRITISH COLUMBIA

Part III of the Uniform Wills Act provides a model for legislation to bring the Convention on International Wills into force in British Columbia. Those provisions concerned with the actual implementation of the Convention are reproduced below.

> 45. In this Part
>
> (a) "convention" means the convention providing a uniform law on the form of international will, a copy of which is set out in the schedule to this Act;
>
> (b) "effective date" means the day that is six months after the date on which the Government of Canada submits to the Government of the United States of America a declaration that the convention extends to the province;
>
> (c) "international will" means a will that has been made in accordance with the rules regarding an international will set out in the Annex to the convention;

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[140] Thomas, *supra* n. 120 at 306.

> *Application of convention*
>
> 46. On, from and after the effective date, the convention is in force in the province and applies to wills as law of the province.
>
> *Rules regarding international wills*
>
> 47. On, from and after the effective date, the rules regarding an international will set out in the Annex to the convention are law in the province.
>
> *Validity of wills under other laws*
>
> 48. Nothing in this Part detracts from or affects the validity of a will that is valid under the laws in force within the Province other than this Part.
>
> *Authorized persons*
>
> 49. All members of (name of Law Society or Society of Notaries) are designated as persons authorized to act in connection with international wills.
>
> *Requests for declaration*
>
> 50. The (Provincial Secretary or other provincial minister) shall request the Government of Canada to submit a declaration to the Government of the United States of America declaring that the convention extends to (enacting province).
>
> *Effective date determined*
>
> 51. As soon as the effective date is determined, (the Provincial Secretary or other provincial minister) shall publish in the Gazette a notice indicating the date that is the effective date for the purposes of this Part.

This form of legislation was employed in Manitoba.[141]

The Commission recommends that:

8. Legislation similar to Part III, section 45 (a), (b) and (c) to section 51 of the Uniform Wills Act, *be enacted in British Columbia.*

3. AUTHORIZED PERSONS

Under Article II of the Convention and under part III, section 49 of the *Uniform Wills Act*, the Province is entitled to designate by legislation those persons who may act as authorized persons for international wills. The duties imposed on the "authorized person" extend beyond merely officiating over a signature, as a notary would do in certain civil law jurisdictions. Authorized persons must ensure accurate execution and completion of a certificate, and therefore, some legal training would appear to be an essential qualification. Two categories of authorized persons may be designated: individuals resident within the province, and diplomatic or consular officials abroad.[142]

(a) Inside the Province

(i) Lawyers

It has always been widely assumed that lawyers would be included as authorized persons. In fact in Alberta, Newfoundland, Manitoba, and Ontario only lawyers were designated as "authorized persons."[143] Since the signing of a certificate requires some legal knowledge, a designation which includes lawyers would be appropriate in this Province.

(ii) Notaries

In British Columbia, a strong argument may be advanced that Notaries Public should be included as persons designated to act in connection with international wills. While the *Notaries Act* of some provinces merely permits notaries to perform their "customary activities,"[144] in British Columbia legislation specifically provides that a notary may prepare certain types of wills. A Notary Public in this Province has the right and power to draw and supervise the execution of those classes of wills set out by the Society of Notaries in its by-laws,[145] which are subject to the approval of the Attorney General and the Benchers of the Law Society.[146] The Society's by-law governing wills provides in part:[147]

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[141] R.S.M. 1975 c. 6, s. 48, *et seq.*

[142] The Convention, Appendix C, Article II. Although this section requires that the list of those designated as "authorized persons" be deposited in Washington, among those jurisdictions which have acceded to the Convention, only the Canadian provinces have done so to date. Although Ecuador has not ratified the Convention, it has deposited a designation of Notaries Public in Ecuador.

[143] S.A. 1976, c. 57, s. 48 (restricted to active members.); S.N. 1975-76, c. 23, s. 34; S.M. 1975, c. 6, s. 52; and S.O. 1977, c. 40, s. 42(3). (Student members excluded.).

[144] Alberta, *supra* n. 143, s. 4(1)(d); Ontario, *supra* n. 143, s. 3.

> The right and power of Notaries Public duly qualified under the Act to draw and supervise the execution of Wills pursuant to Section 13 of the Act shall be limited to the class of Wills following, that is to say:
>
> (1) Wills whereby the testator directs his estate to be distributed immediately upon his death, or
>
> (2) Wills where the beneficiaries named in the Will predecease the testator and there is a gift over to alternative beneficiaries vesting immediately on the death of the testator; or
>
> (3) Wills where the deceased's assets vest in the beneficiary or beneficiaries as members of a class not later than the date when the beneficiary or beneficiaries or the youngest of the class attains majority.

It should be pointed out that the four Canadian Provinces which have adopted the international form of will to date have not designated notaries public as authorized persons. The reason for this exclusion may be that in none of those provinces do the notaries have specific powers to prepare wills, although several permit the customary powers to be exercised.[148] The preparation of wills is generally considered to be a customary power of a notary.[149]

In British Columbia, notaries have historically occupied a more prominent position than in other common law provinces. As long as notaries public are permitted to prepare certain types of wills, there does not appear to be any reason to restrict the manner of execution of those wills to the "English" or formal manner. The international will should be available to clients of both notaries and lawyers.

(iii) Foreign Consular Agents in British Columbia

The Convention permits the designation of consular agents abroad as authorized persons for wills of its nationals. Thus a country which has acceded to the Convention could designate its Vancouver consular officials as authorized persons for its nationals when in British Columbia. The Convention also permits local legislation to prohibit foreign consular officials from being designated as authorized persons. We are not aware of any reason why such a prohibition should be enacted. If a country wishes to designate a local official it should be free to do so.

(iv) Other Persons

Some writers have commented that other individuals, such as court officials and paralegal assistants, could also be designated as authorized persons to act on international wills. There appear to be two major reasons for restricting the class of authorized persons within the province to lawyers and notaries public. The first reason is the necessity of a minimum level of legal knowledge, and the second is that both groups have centralized governing and disciplinary bodies. We believe that persons other than members of the Law Society and Society of Notaries Public should not be designated as "authorized persons" within this Province.

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[145] The *Notaries Act*, R.S.B.C. 1979, c. 299, s. 13 (1) (b).

[146] *Ibid*. s. 2.

[147] 1976 Bylaws of the Society of Notaries Public, Part XIII, s. 13.01.

[148] *The Notaries Public Act*, R.S.N. 1970, c. 275, s. 6; *The Notaries Public Act*, R.S.A. 1970, c. 261, s. 4; *The Notaries Act*, R.S.O. 1970, c. 300, s. 2.

[149] *See* Cranstoun, James, Brooke's Treatise on the Office and Practice of a Notary of England, 7th edition, London, 1913; and *see also* 28 Halsbury's Laws of England, (3rd ed.) 21.

(b) Outside the Province

When the Convention was being drafted numerous individuals outside of the jurisdiction were considered as eligible to be designated "authorized persons." Although it was decided to exclude ship captains and airline pilots, diplomatic or consular officials abroad were ultimately included. It is evident that diplomatic officials could act as a designated person only if the Canadian Department of External Affairs was willing to impose a duty to so act. A similar designation is found in the United States Uniform International Wills Act,[150] an American Model Statute, which defines "authorized persons" as including members of the diplomatic and consular service of the United States. Neither the Convention itself nor this model legislation is yet in force in the United States.

In Canada, the Department of External Affairs has advised the Commission that they have serious reservations about the designation of their consular officials as "authorized persons."[151] They are concerned that a prospective testator will seek legal advice concerning the execution of his will from an official who is not qualified to give it. In view of the possibility that the Crown might be liable if erroneous advice is given, the Department prefers that a Canadian citizen abroad seek the advice of a local lawyer.

In view of the concerns expressed by the Department of External Affairs, we are not prepared to propose that diplomatic and consular officials should be included in the definition of "authorized persons." If the Department of External Affairs subsequently changes its position, the legislation can be amended.

The Commission recommends that:

9. Members of the Law Society of British Columbia and Notaries Public enrolled pursuant to section 7 of the Notaries Act *be designated as authorized persons under Part III of the* Uniform Wills Act. *[See* Notaries Act, *Bill 28, 1981, section 9].*

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[150] 1977 Handbook of the National Conference of Commissioners on Uniform State Laws, p. 358. This model act has two names, The United States Uniform International Wills Act (not to be confused with the Uniform International Law annexed to the Convention and reproduced *infra* as Appendix D) and part 10 of the Second Article of the Uniform Probate Code.

[151] Letter from the Director, Legal Operations Division, Department of External Affairs, to Legal Research Officer, Law Reform Commission of British Columbia, February 2, 1979.

CHAPTER IV ALTERATION AND REVOCATION

A. Alteration

Once a will has been properly executed, a testator may wish to amend a bequest or replace a beneficiary. These changes of mind are often reflected on the face of the will by the obliteration or alteration of words, or by handwritten interlineations. Even testators who have had wills prepared by solicitors often attempt alterations at home without first taking legal advice.

Strict rules and presumptions have been developed to govern the validity of alterations. Some of these rules are set out in the *Wills Act*,[1] and others have been developed by courts of common law and equity. Under the *Wills Act*, the alteration must be signed in the presence of two witnesses, each of whom must affix his signature at or near the alteration.[2] The testator's initials or signature alone is not sufficient.[3] In addition, the difficulty in ascertaining whether alterations were made before or after the execution of a will led courts to formulate a presumption that alterations were made after the will was executed. Occasionally the question whether an alteration was made before or after a will was executed will lead to long and complex litigation.[4]

A major difficulty facing the courts has been determining the validity of handwritten changes to both formal and holograph wills. In jurisdictions which permit holograph wills the problem is exacerbated by the failure of the *Wills Act* in question to settle the relationship between holograph and formal wills. For example, in 1958 the Manitoba Queen's Bench held that statutory formalities required for alterations to formal wills do not apply to holograph wills.[5] The better view appears to be that in Manitoba a handwritten alteration extensive enough to be characterized as a holograph codicil will probably be effective. Indeed, a holograph codicil has been held to alter a formal will even though unattested.[6] In the recent case of *Re Comerford*,[7] Lockwood Surr. Ct. J. reviewed these authorities. The testatrix had executed both a formal will and a later holograph will. Clauses in both wills had been obliterated or "x'd" out. It was held that the obliterations were effective to revoke those clauses in the informal will but not in the formal will. Hence the clause in the holograph will revoking previous wills which had been "X'd out," was ineffective to revoke the formal will, and the holograph will took effect as a codicil to the formal will. We have rejected the idea of providing for a separate category of holograph wills in favour of a broader remedial provision. Even so, the problem of informal modification of formal wills still arises.

Earlier in our Report, we canvassed the arguments for and against a dispensing power. We are of the view that those arguments also militate in favour of permitting the court to exercise a similar discretion in respect of alterations to either formal or informal wills.

We see little justification for the illogical result arrived at in *Re Comerford*. The validity of an informal alteration should not depend on the form of the will. In both cases the alteration is equally suspicious. If effect is to be given to an informal alteration, it seems preferable to focus on the evidence indicative of its authorship, rather than the form of the will. However, serious questions may be raised concerning questions of "obliteration." Where a will is altered by extensive interlineation, or by an additional paragraph, then there is writing. Can the same be said when, for example, a clause of the will is simply scratched out? In such a case there are no marks on the page which might fairly be called writing, and an amending section which merely permitted alterations which complied with our Recommendation 5 would be ineffective. The threshold requirement of writing would arguably not be satisfied by a mere obliteration.

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[1] R.S.B.C. 1979, c. 434, s. 17.

[2] *Re Burk*, (1920) 17 O.W.N. 404; *Re East*, (1923) 24 O.W.N. 394; *Re Garton*, [1924] 1 W.W.R. 1023.

[3] *Re Herbert*, [1927] 3 W.W.R. 24 (Sask.Surr.Ct.).

[4] *See, e.g., Oprescu* v. *Biedler*, unreported B.C.S.C., 1980 No. C781641, Vancouver Registry, August 14, 1980. In this case it was alleged that a solicitor had fraudulently altered a will.

[5] *Equitable Trust Co.* v. *Doull et al.*, (1958) 25 W.W.R. 465 at 470 (Man. Q.B.) *per* Monnin, J.

[6] *Re Cottrell*, [1931] 4 D.L.R. 600 (Alta. S.C.); *Re Manvel*, (1960) 23 D.L.R. (2d) 190 (Alta. S.C.); *Re Haverland*, (1975) 55 D.L.R. (3d) 122 (Alta. S.C.); *Re Comerford*, unreported, Man. Surr. Ct., Feb. 17, 1981 per Lockwood Surr. Ct. J.

[7] *Ibid*.

This is a difficult issue. Initially it is tempting to draw a distinction between obliteration and alterations of a more extensive nature, on the ground that the latter contain more reliable indicators of the testator's hand. However, to frame the question in such a manner highlights the nature of the problem. It is basically one of evidence. We have every confidence that British Columbia courts are well able to rule on matters such as the identity of the testator and the genuineness of a will, and that they will undoubtedly carefully scrutinize alterations, whether in writing, by way of codicil, or otherwise.

We are buttressed in this conclusion by the Manitoba Law Reform Commission, which also concluded that the dispensing power they recommended should "be worded so as to apply to defects in . . . alteration." Moreover, courts are increasingly willing to recognize that testators often choose unusual methods of altering wills, and are prepared to consider the effect of the testator's action on the balance of his will. In *Re Everest*,[8] the testator had cut out a large portion of his will. Rather than holding that sufficient to constitute a destruction of the will, Lane J. held that it was a mere alteration, and admitted the surviving portion of the will to probate.

It is readily apparent that a threshold requirement of writing is inappropriate if a dispensing power is to extend to obliterations. On the other hand, we remain convinced that an obliteration or written codicil should be signed.

Section 17 of the *Wills Act* provides:

> **17.** (1) Subject to subsection (2), unless an alteration that is made in a will is made in accordance with the provisions of this Act governing the making of a will, the alteration has no effect, except to invalidate words or meanings that it renders no longer apparent.
>
> (2) An alteration that is made in a will is validly made when the signature of the testator and the subscription of the witness or witnesses to the signature of the testator to the alteration are made
>
> (a) in the margin or in some other part of the will opposite or near to the alteration; or
>
> (b) at the end of or opposite to a memorandum referring to the alteration and written in some part of the will.

Read with our Recommendation 6, which redefines "will" to include a document admissible under Recommendation 5, this section partially incorporates the dispensing power we suggest is appropriate. An alteration which conforms to the requirements stipulated by Recommendation 5 is "made in accordance with the provisions . . . governing the making of a will." However, recommendation 5 specifies writing as a threshold requirement. The word "writing" implies the use of words. Such a threshold requirement is therefore inappropriate insofar as the alteration of wills is concerned. A will may be altered by simply striking out words. We have therefore concluded that insofar as the dispensing power applies to alterations, it should not require writing.

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[8] [1975] Fam. 44.

The Commission recommends that:

10. Section 17 be amended to read as follows:

17 (1) An alteration made in a will is of no effect, except to invalidate words or meanings it renders no longer apparent, unless the alteration:

- *(a) is made in accordance with the provisions of this Act governing the making of a will: or*
- *(b) is signed by the testator, and*
  - *(i) the testator dies after this subsection comes into force, and*
  - *(ii) the court is satisfied that the testator knew and approved of the alteration, and intended it to have testamentary effect.*

(2) For the purposes of subsection (1) (a), an alteration that is made in a will is validly made when the signature of the testator and the subscription of any witness which is required, are made

- *(a) in the margin or in some other part of the will opposite or near to the alteration; or*
- *(b) at the end of or opposite to a memorandum referring to the alteration and written in some part of the will.*

B. Revocation

1. PRESENT RULES

A will can be revoked by an intentional act of the testator or by operation of law. At common law a number of changes in the testator's circumstances were effective to revoke a will by operation of law. Although in general the rules respecting revocation by change of circumstances have been abrogated in the *Wills Act*,[9] there are nevertheless three cases where such a change will effect a total or partial revocation of a will. Under section 15 of the *Wills Act*, a will is revoked on marriage of a testator unless it is expressly made in contemplation of "the marriage", or unless it is made in the exercise of a power of appointment which, in default of its exercise, would not devolve upon the testator's heir, executor, or administrator. Section 16 of the *Wills Act*, recently proclaimed in effect as of August 1st, 1981, provides that a gift in a will is revoked on one of a number of triggering events, including divorce or judicial separation. Under section 11 of the *Wills Act*, a dispostion in favour of a witness, or a spouse of a witness, is void. We shall deal with section 11 in the next chapter of this Report.

2. INTENTIONAL REVOCATION

(a) The Current Law

A will can be intentionally revoked by a testator only by the three means specified in section 14 of the *Wills Act*:[10]

> (1) a later inconsistent will;
>
> (2) a written declaration executed in compliance with the requirements for the execution of the will; or
>
> (3) burning, tearing or destruction of the will, either by the testator or on his direction.

The most common method of revocation is the making of another will containing a clause revoking prior wills. A will which does not contain a clause revoking earlier dispositions would still revoke it to the extent of any inconsistencies. If it purported to dispose of all of the testator's property, the the dispositive portions of the previous will would be spent.[11]

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[9] R.S.B.C. 1979, c. 434, s. 14.

[10] *Wills Act*, R.S.B.C. 1979, c. 434, s. 14.

The second method of revocation, a written declaration, is rarely employed in isolation as the testator is more likely to destroy the will than to writ out a declaration which must be executed in accordance with the provision for making a will. Despite its infrequent use, this provision should be retaine as it could be useful in some circumstances. For example, a testator may wis to revoke a will which he does not have at hand, or which he has mislaid

The issue of whether the law concerning the revocation of wills should b amended to encompass different methods of indicating that a will is no longe to have effect is not an easy one. The current law requires that even the mo obvious attempts at revoking wills are ineffective unless they fall within th express words of section 14 of the *Wills Act*. This is so even where the court certain that the act was done *animo revocandi*. In *Bell* v. *Mathewman*,[12] testator wrote "cancelled July 22, 1910" on the face of the will and signed i He also drew two lines through his signature and placed an "X" over th witnesses' attestation. The court stated:[13]

> This will must be granted probate, unless it can be regarded as 'otherwise destroyed' by the attempted cancellation.
>
> What the testator did, in writing 'cancelled', stating the date, signing his name beneath the words and figures, and drawing lines though his signature and across the signatures of the three witnesses, was, I find, done with the intention of revoking the will.
>
> Notwithstanding the act so deliberately done *animo revocandi*, I am of the opinion that the cancellation intended must, upon authority, be held to be ineffective.

In *Re Kane*[14], O'Hearn Prob. Ct. J. admitted to probate a will which ha had its two pages X'd out: a form of revocation permitted under Nova Scoti law if duly attested. The court held:

> Crossing out as a form of cancellation is a very ancient device: it is found, for example, in New-Testament times, in the Greco-Roman world under the name *chiazein*, "to X out", "to *chi*". It appears, however, that even before the original Wills Act of 1837 the Courts had set their face against this as a method of cancelling wills unless the change was duly authenticated in a way analogous to execution of a will: the authorities are collected in Williams on Wills (1952), p. 97. The provision guards against two possible dangers: (1) the testator's cancelling of the will by crossing it out secretly and without doing anything further about it, thus leaving a vacuum with respect to his expressed intent; (2) someone else getting hold of the will and cancelling it without the knowledge or authority of the testator, perhaps even after his death.
>
> The provisions of the Wills Act with respect to execution and cancellation have been adhered to rather closely by the Courts, in an effort to avoid dangers of the kind just cited, as well as to provide a fairly fool-proof and practical mode of execution of a valid will . . .
>
> In sum, I am satisfied that it has been proved that the testator was of sound and disposing mind and that the will was duly executed, and I am also satisfied that the marks made on the two pages of the will, in form of a "X", were made after the execution of the will and are of no testamentary effect, not having been authenticated in any way as required by the Act. Accordingly, the rest of the will without the marks will be admitted to probate and probate will issue accordingly.

Courts are constrained to apply a strict compliance rule however compellin the evidence might be that the testator no longer intended his will to b effective. In *Cheese* v. *Lovejoy*,[15] the testator wrote "All these are revoked across his will, drew lines through various portions of the writing and in the presence of a witness declared the will to be revoked, crumpled it up and threw it into a corner of the room. It was rescued by the housekeeper, who preserved it, although the testator had not requested her to do so. The testator never asked to see it again. Nevertheless the will was admitted to probate. James L.J. held:[16]

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[11] *Re Fitzsimmons*, (1939) 2 D.L.R. 50; *Re Splane*, (1974) 4 W.W.R. 302.

[12] (1920) 48 O.L.R. 364. The report contains a reproduction of the will showing the attempted cancellation.

[13] *Ibid.*

[14] (1978) 5 E.T.R. 44 (N.S. Court of Probate).

[15] (1876-7) 2 P. 251 (C.A.).

> We cannot allow the appeal in this case. It is quite clear that a symbolical burning will not do, a symbolical tearing will not do, nor will a symbolical destruction. There must be the act as well as the intention. As it was put by Dr. Deane in the Court below, "All the destroying in the world without intention will not revoke a will, nor all the intention in the world without destroying: there must be the two."

The English Law Reform Committee considered the problems posed by cases like *Cheese* v. *Lovejoy* in their 22nd report. They concluded:[17]

> The evidence we received contained a certain amount of criticism of *Cheese* v. *Lovejoy*, where it was held that writing "This is revoked" across the back of a will, screwing it up and throwing it into a wastepaper basket was insufficient to revoke the will. In order to satisfy the terms of section 20 there must be an actual destruction as well as an intention to destroy. Critics of the case therefore suggest that the court should have a discretion to give effect to any act which manifests an intention on the part of the testator to revoke his will.
>
> However, the majority of our witnesses recommended no change in the law, and, although we were attracted to the suggestion that section 20 should be widened, we are not convinced that methods of revocation other than those prescribed by section 20 are required. We think that the requirements for the validity of a revocatory act should be as certain as possible and that legislation cannot be expected to cover all varieties of conduct. We understand that wills of the *Cheese* v. *Lovejoy* type, where there is some indication that the testator may have intended to revoke his will, are extremely rare, amounting to 2 or 3 out of the 29,000 wills admitted to probate in the Principal Registry each year. No witness mentioned any comparably striking case. We therefore conclude that legislation is not required to reverse this decision.

We do not agree with this conclusion, particularly since it preserves rules which can lead to results as contrary to common sense as those in *Cheese* v. *Lovejoy* and *Bell* v. *Mathewman*. We have abandoned the unqualified acceptance of formalities in respect of the formation of wills and it would be inconsistent to ignore probative evidence in respect of their revocation. Should the court be compelled to probate a will which, on strong evidence, it is satisfied represented the testator's intent at the time it was written, but ignore equally strong evidence probative of the testator's having revoked the will? The undue insistence on formalities respecting the revocation of wills would create the anomalous result that a court, directed to have regard to whether an informal document truly represents the testator's intent, would be obliged to conclude that it did, even if in fact convinced that the testator intended to revoke it.

We are not persuaded by the figures used by the English Law Reform Committee. Our correspondents seemed to favour some relaxation of the present rules respecting revocation. One correspondent stated:

> I am convinced that the requirement of Wills Act formality for revoking *instruments* is a thoughtless and unwise mutuality notion that lacks foundation in the purposes of the Wills Act. The rationale seems to be since it takes Wills Act formality to make a will, it should take Wills Act formality to unmake a will. But, we are not consistent about that, since we allow revocation by physical act, yet when the testator attempts to revoke by writing, we insist on Wills Act formality. In truth, virtually all the permitted modes of revocation by physical act are intrinsically more ambiguous than revocation by writing, even when the writing lacks Wills Act formality. Physical act without more must be ambiguous on the

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[16] *Ibid.* at 523.

[17] 22nd Report, at 13.

> questions whether the act was (a) done by the testator, and (b) done with animus revocandi. An unwitnessed writing is always clearer on this point. My favorite case for illustrating this is *Thompson* v. *Royall*, 163 Va. 492, 175 S.E. 748 (1934). As with the basic substantial compliance doctrine, I rely upon two premises for the belief that a change in rule would be trouble-free. First, professional estate planners would use Wills Act formality anyhow. Second, I would trust the ordinary burden-of-proof rules (requiring the proponent of revocation to prove that an informal writing was genuine and deliberate) to handle the cases that would otherwise trouble us, such as ambiguous writing or writing of doubtful genuineness.

In particular, we are of the view that insisting on compliance with witnessed writing or destruction in order to revoke a will is inappropriate in a *Wills Act* which provides for a parallel scheme of informal wills.

There are two major options for reform. The first is merely to amend the *Wills Act* to add to the number of acts effective to revoke a will. The second is to extend the dispensing provision to encompass the revocation, as well as the formation of wills.

(b) Options for Reform

(i) Create New Procedures

In those jurisdictions which have adopted the Uniform Probate Code "cancelling" a will had been added to the list of acts effective to revoke a will. In *Re Kane* "X'ing" out the will would have been effective if properly attested. A number of other suggestions can be made — crumpling, drawing lines through dispositions, or revoking by an oral declaration before witnesses are only some of the options.

The drawback to this kind of an amendment is that it continues to concentrate on form to the detriment of substance. If, for example, the act of cancelling was added to section 14 of the *Wills Act*, it is arguable that "X'ing" out the will would not amount to a valid revocation, even if attested. In other words, testators would still attempt to revoke their wills in ways which a court would be obliged to ignore, and probate would be given to a will even if it could be proved that the will did not embody the testator's real intent. It would be possible to catalogue a number of acts which could automatically revoke a will. It is fairly difficult, however, to envisage all possible methods of revocation which a testator might adopt.

In addition, not all acts are unequivocal. A will may be crumpled and stuffed in the testator's back pocket, or it may be crumpled and thrown in a waste paper basket accompanied by words of revocation. In both cases, the crumpling will be apparent on the face of the will, but whether or not the will should be regarded as revoked depends upon the surrounding circumstances.

(ii) Extend the Dispensing Power

In Chapter 3 we proposed the adoption of a dispensing power in respect of the formation of wills, subject only to two threshold requirements: writing and the testator's signature. In the case of the revocation of a will, as in the case of the formation of a will, it is the testator's intention which is primarily in issue. It may be argued that when it can be shown that the testator did something with the intent thereby to revoke his will, and the court is satisfied that the testator in fact had the requisite *animo revocandi*, then the insistence on form is as technical, unnecessary and unjustifiable in the case of the revocation of a will as it is in its creation. Having regard to the testator's intent in deciding whether a will has been created, but ignoring his intent in deciding whether it has been revoked, is difficult to defend.

The major problem with an amendment which would decline to give effect to the will where the testator has done any positive action *animo revocandi* is whether there should be any threshold requirements. Unlike the case of the creation of a will, there is no general public attitude concerning the revocation of documents to which one can turn. Writing and a signature are obviously inappropriate, as even under the current law the destruction of a will is effective to revoke it.

(c) Recommendation

In our Working Paper, we did not come to any conclusion concerning which option is preferable. The majority of our correspondents favoured the "remedial approach." We have now concluded that the extension of the dispensing power to cases of revocation is appropriate. In our view, it is illogical and undesirable to give effect to a will which undoubtedly does not represent the testator's true intent.

In the Working Paper, we suggested a threshold requirement of a "dealing with the will," to which a number of our correspondents responded favourably. That requirement will generally lead to some apparent change on the face of the will, and therefore has the virtue of at least alerting the court, or a possible beneficiary, that the will might have been revoked. Although we acknowledge that the logical result of the approach we have taken is to permit the oral revocation of wills, we think it impractical to go that far. The threshold we suggest should be effective to weed out most revocations in which the testator's declarations are not implemented by action.

The Commission recommends that:

11. Section 14 of the Wills Act *be amended by the addition of a provision comparable to the following to subsection (1):*

> *(e) any other act of the testator, or of a person by his direction and in his presence, if:*
>
> > *(i) the consequence of the act is apparent on the face of the will, and*
> >
> > *(ii) the court is satisfied that the act was done with the intent of the testator to revoke all or part of the will.*

3. REVOCATION BY OPERATION OF LAW

(a) Partial Revocation on Marriage Breakdown

In Working Paper No. 28 which preceded this Report, we considered the effect of section 16 of the *Wills Act*. That section, which has been proclaimed in effect as of August 1st, 1981,[18] provides:

> 16. (1) Where in a will a testator
>
> (a) gives an interest in property to his spouse;
>
> (b) appoints his spouse executor or trustee; or
>
> (c) confers a general or special power of appointment on his spouse,
>
> and after the making of the will and before his death
>
> (d) a judicial separation has been ordered in respect of his marriage;
>
> (e) his marriage is terminated by a decree absolute of divorce; or
>
> (f) his marriage is found to be void or declared a nullity by a court
>
> then, unless a contrary intention appears in the will, the gift, appointment or power is revoked and the will takes effect as if the spouse had predeceased the testator.
>
> (2) In subsection (1) "spouse" includes a person considered by the testator to be his spouse.

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[18] B.C. Reg. 49/81.

In discussing this section, we noted in Working Paper No. 28 that the events stipulated in section 16 (1) as effective to bring about a deemed lapse were not identical with those effective to vest an interest in family assets in a spouse under section 43 of the *Family Relations Act*.[19] As a result, it would be possible that in certain cases a surviving spouse would be able to take under the will and to assert an interest in family assets, while in other cases the surviving spouse, by virtue of the discrepancy in wording, would not be entitled either to an interest under the *Family Relations Act*, or to the bequest in the will. We tentatively concluded that section 16 should be amended, and that the deemed lapse provided for in section 16 should be contingent on the same events effective to vest an interest in family assets under section 43.

Our attention has also been drawn to several other possible deficiencies in section 16. The "triggering events" are not well defined. Section 16 provides for both a deemed lapse, and the revocation of a gift. We are not convinced that rights to property are necessarily identical whether the gift is regarded as having lapsed or been revoked. Which concept is to prevail, lapse or revocation? Moreover, section 16 makes no provision for reconciliation, and it might be thought inappropriate that the court be compelled to continue to deem the surviving spouse to have predeceased the testator where the parties have reconciled and are co-habiting at the date of death.

As a result of our doubts concerning the effect of section 16, in Working Paper No. 28 we formulated a rather complex proposal to deal with the issues raised by these two Acts. However, as we considered the responses to this proposal, it became increasingly apparent that the problems we had identified were only manifestations of a larger, and more fundamental problem — that of the relationship between the two Acts.

A few examples will serve to illustrate the wide range of problems raised by a deferred matrimonial property regime. Assume, for example, two wives with sickly husbands, and unstable marriages. Each husband executes a will in which all his property is left to his mistress, to the exclusion of his wife. Each wife wishes to leave her husband. Wife A, however, stays at home only to care for her husband. Wife B is less solicitous, and leaves her husband, obtaining a judicial separation. Wife A has no claim, and must apply for a discretionary share under the *Wills Variation Act*.[20] Wife B, who was less generous towards her spouse, may assert an absolute interest in family assets. Is it fair that the rights of a surviving spouse of a subsisting marriage should be less well protected than those of a surviving spouse of a marriage which has broken down?

Assume that in his will, a testator named Bloggs leaves his Ferrari to his brother, Doe. Two days before Bloggs' death, a court makes an order under section 44 of the *Family Relations Act* in favour of Mrs. Bloggs. Mrs. Bloggs owns a Corvette. The Ferrari is in Bloggs' name, the Corvette is in his wife's. A fact pattern as simple as this one raises a number of difficult questions for the executor. Are the two cars family assets? If they are, then who is entitled to the husband's half-interest in the Corvette? Is Doe entitled to take the Ferrari, or is he a tenant-in-common with Mrs. Bloggs? Alternatively, does the vesting of a half-interest in the Ferrari in the wife have the effect of converting the outright gift of the Ferrari into a gift of the value of the testator's interest, resulting in an ademption of the gift to Doe? Is Doe thereby deprived of the whole of his gift?

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[19] R.S.B.C. 1979, c. 121. Sections 43 and 44 provide as follows:

Equality of entitlement to family assets on marriage breakup.

43 (1) Subject to this Part, each spouse is entitled to an interest in each family asset on or after March 31, 1979 when

(a) a separation agreement;
(b) a declaratory judgment under section 44;
(c) an order for dissolution of marriage or judicial separation; or
(d) an order delaring the marriage null and void

respecting the marriage is first made.

(2) The interest under subsection (1) is an undivided half interest in the family asset as a tenant in common.

(3) An interest under subsection (1) is subject to
(a) an order under this Part; or
(b) a marriage agreement or a separation agreement.

(4) This section applies to a marriage entered into before or after this section comes into force.

Declaratory Judgement

44. On application by 2 spouses married to each other or by one of the spouses, the Supreme Court may make a declaratory judgment that the spouses have no reasonable propspect of reconciliation with each other.

[20] R.S.B.C. 1979, c. 435.

On another level, it is possible to foresee numerous practical problems. Where a triggering event under section 43 of the *Family Relations Act* occurs before one of the spouses dies, by virtue of the *Family Relations Act* a *prima facie* half interest in all the family assets will vest in each spouse. In such a case, the executor cannot rely merely on apparent title. Instead, he must survey all of the deceased's assets, and all those of the surviving spouse in order to determine which assets were family assets at the date of the triggering event, and which were not. The deceased spouse's will may be effective to dispose of a half-interest in a family asset long regarded by the surviving spouse as his own, and ineffective to dispose of particular items in the manner contemplated by the deceased spouse.

Other theoretical problems come immediately to mind. Should death be a triggering event under the *Family Relations Act*? Should marriage breakdown result in a spouse being deemed to predecease on an intestacy? Should anyone who may claim for maintenance from the testator during his life have a similar claim under the *Wills Variation Act*?

The complexity of these issues, and the overwhelming importance of developing a consistent policy, have persuaded us that it would be inappropriate to deal with these questions piece-meal. Accordingly, we have concluded that this Report should not recommend any change to section 16, although we recognize that section 16 may lead in some cases to unfair and arbitrary results. Instead, we intend to examine in a future Report the problems inherent in harmonizing the matrimonial property provisions of the *Family Relations Act* with the law respecting devolution of property on death.

(b) Revocation of a Will on Marriage

Before 1837 the will of a woman was revoked by her marriage. The will of a man was not revoked by marriage alone, but by marriage plus the subsequent birth of a child. These rules led to much confusion in cases where the child predeceased the testator, or where a spouse predeceased the testator, who then remarried.

The Real Property Commissioners referred to the law of revocation as complicated and incongruous. They recommended that only the will of a woman should be revoked on marriage. When the *Wills Act, 1837* was passed, however, the common law was modified and wills of both men and women were automatically revoked on marriage.

One commentator recently pointed out that the preoccupation of the English Parliament in enacting this provision was with the protection of children of the marriage, rather than protection of the mother of those children.[21] Two other concerns prompted Parliament to introduce a provision revoking a will on marriage. Parliament desired to make uniform the law concerning the effect of marriage, as well as to promote freedom of testation.

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[21] McKay, Lindsay, *The Contemporary Validity of Section 18 of the Wills Act, 1837*, (1976) 8 Victoria U. of Wellington L. Rev., 246.

The enactment of the *Wills Variation Act* in British Columbia has called into question the continuing utility of the automatic revocation of a will on marriage provided for in section 15 of the *Wills Act*. That section provides:

> **Revocation by marriage**
>
> 15. A will is revoked by the marriage of the testator, except where
>
> (a) there is a declaration in the will that it is made in contemplation of the marriage; or
>
> (b) the will is made in exercise of a power of appointment of property which would not in default of the appointment pass to the heir, executor or administrator of the testator or to the persons entitled to the estate of the testator if he died intestate.

A number of points may be made in favour of repealing section 15. Revoking the will disinherits legatees who under the current law have no right to claim a share of the deceased's estate on the resulting intestacy. The surviving spouse might become entitled to far more under the intestacy than is required to meet his needs. The revocation operates without regard to the circumstances of the case and for that reason it is an extremely blunt instrument. It will, for example, disinherit a crippled sister of the testator in favour of the testator's millionaire wife. Its effect is to upset the testator's carefully considered dispositions and impose upon his estate a statutory scheme of intestate distribution which ignores obligations which the testator expressly recognized. Considerations such as these led to the Commission proposing in Working Paper No. 28 the repeal of section 15. A minority of Commissioners adhere to this conclusion.

A number of those who responded to Working Paper No. 28 disagreed with the proposal to repeal section 15. One of our correspondents wrote:

> I do not agree with this proposal. The Working Paper, as I read it, offers three reasons for it. First, the rule under which a will is automatically revoked on marriage has been rendered redundant by changed social circumstances. What are these changed circumstances? Second, a spouse and children are sufficiently protected by the Wills Variation Act. This does not afford them automatic protection; they have to rely on the exercise of judicial discretion. The protection afforded by the Act is uncertain, depending very much on circumstances and perhaps on the attitude of a particular judge. It is a poor replacement for the automatic provisions of the law on intestate succession. Third, because of the Family Relations Act, it is suggested that there will be more marriage contracts and that the influence of the will will decline. That may be so, but it is far too early to start enacting legislation on that basis. In any event, if there is no marriage contract in a particular case, the other spouse would still require the protection afforded by the automatic revocation.
>
> I think that the rationale behind the present law is sound. A testator should consciously disinherit his spouse and children. They are, I think, *prima facie* entitled to what the law gives them on intestacy. A testator is, of course, free to take that away if he so wishes, but he should do it by a conscious act.

On reconsidering the proposal to repeal section 15, the majority of Commissioners concluded that a will should continue to be revoked on marriage. They agreed that a surviving spouse should not be obliged to apply for a discretionary share in the deceased spouse's estate.

As a result of this conclusion, some time was spent examining the manner in which a testator who wishes his will to survive his marriage may so provide. Under section 15 as it currently stands, a will survives a marriage only if it expressly states that it is made in contemplation of a particular marriage.[22] In contrast to the law of other jurisdictions with similar provisions, it is not sufficient that the intent of the testator may be readily gathered from the will as a whole,[23] or that it refer merely to a general intent to marry sometime in the future.[24] The majority who favoured retention of section 15 thought that it should be modified so as to validate a will made in contemplation of marriage generally provided the testator's intent can be gathered from the whole of the will. To give effect to this conclusion, it was suggested to us that section 15 might be amended to read as follows:

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[22] *Re Pluto*, (1969) 69 W.W.R. 765 (B.C.S.C.).

[23] *See Burton v. McGregor*, [1953] N.Z.L.R. 487, *Public Trustee v. Crawley*, [1973] 1 N.Z.L.R. 695.

> 15. A will is revoked by the marriage of the testator, except where:
> (a) the will is expressed to be made in contemplation of marriage, notwithstanding that marriage to a specific person is not contemplated; or
> (b) the will, or any term of the will, indicates an intent that the will be effective notwithstanding a marriage; or
> (c) the will is made in exercise of a power of appointment of property which would not in default of the appointment pass to the heir, executor or administrator of the testator or to the persons entitled to the estate of the testator if he died intestate.

The tentative preference of the majority for retaining section 15, modified in a fashion similar to that indicated, is based largely on the undesirability of compelling a surviving spouse to pursue a claim under the *Wills Variation Act*, rather than relying on his rights on an intestacy. However, in a later report we shall be examining the *Wills Variation Act* in detail. We think that a formal recommendation respecting the retention of section 15 should await the outcome of that examination.

For that reason we have not subjected the suggested draft of a new section to detailed consideration, and cannot therefore comment on its provisions. It is possible that the nature of the recommendations that emerge in our Report on Statutory Succession Rights will alter both the substantive and procedural rights of a surviving spouse and other possible claimants. Rights to apply for a discretionary share of a deceased's estate may be extended to intestacies. The recommendations we shall make governing these questions will obviously affect our deliberations respecting the appropriateness of revoking a will to protect a surviving spouse. Accordingly, apart from recording the current preference of the majority of Commissioners for retaining section 15 with some modifications, and the view of a minority of Commissioners that the section be repealed, we make no recommendations for reform at this time.

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[24] *Sallis* v. *Jones*, [1936] P. 43; *Re Sedgwick*, [1931] 1 W.W.R. 837 (B.C.S.C.).

CHAPTER V

WITNESSES

A. Competency of a Witness

The *Wills Act* does not prohibit any person from proving the execution of a will. Anyone who is mentally competent and has reached the age of reason may act as a witness to its signing.[1] In addition, the *Wills Act* specifically provides that executors, beneficiaries and those creditors whose debts are secured under the will may act as witnesses.[2] The historical reason for the inclusion of these three categories of persons was to remove any doubt as to the validity of a will which such an "interested" party might have witnessed.[3]

Under the *Statute of Frauds*,[4] wills of realty were originally required to be attested by three or four "credible" witnesses. Witnesses with a financial interest in the will were not regarded as credible. In these cases the whole will was void.[5] There were several legislative responses to these common law rules, enacted with the intent of validating wills and giving effect to the testator's wishes. First, in 1752 an act was passed providing that a will which had been witnessed by a beneficiary would remain valid, but that beneficiary would be deprived of any interest he might have in the estate.[6] This issue is addressed in part B of this chapter. In addition creditors were permitted to act as witnesses. In 1833 the Real Property Commissioners agreed with the philosophy of this statute and commented that much litigation and injustice would be prevented by providing that a will should not be void by reason of interest or lack of credibility on the part of a witness.[7]

The second issue faced by the Real Property Commissioners in this area was that a witness might have been legally "incompetent" under the rules of evidence at the time of execution of the will, and the testator may have been unaware of that fact. The Commissioners commented:[8]

> It may also be urged, that a witness ought not to be objected to on any other ground; that at present, if a witness becomes infamous after he had attested the Will, he is, notwithstanding, a good witness within the Statute; and yet if he has been convicted of a felony before the attestation, although the Testator may not have been aware of it, he is not a good witness, and the Will is void; that the validity of a Will should not be affected by the interest or character of the witness, except so far as a Jury may be induced to disbelieve his evidence, in case the validity of the Will should be disputed.

As a result of their Report issued in 1833, the *Wills Act, 1837* included four specific provisions designed to clarify or amend the law of that time:[9]

1. A will would remain valid if a witness was incompetent to prove its execution at the time of its signing (or if he subsequently became incompetent);
2. Creditors whose debts are charged in the will were competent witnesses;
3. Executors named in the will could also be witnesses; and
4. Beneficiaries under a will could act as witnesses to its execution.

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[1] Feeney, Thomas G., The Canadian Law of Wills: Probate, Butterworths (1976) at 62; *but see In the Estate of Gibson*, [1949] P. 434, where a blind law clerk was held not to have properly witnessed the codicil of a man he knew well by voice.

[2] *Wills Act*, R.S.B.C. 1979, c. 434, ss. 11, 12 and 13.

[3] *See* Report of the Statute Law Revision Committee on the Wills (Interested Witnesses) Bill, 1971, Melbourne, Victoria, Australia, 1972 at 11.

[4] (1677) 29 Car. II, c. 3.

[5] *Anstey* v. *Dowsing*, (1775) 2 Stra. 1253; 93 E.R. 1164.

[6] 25 Geo. II (1752) c. 6, s. 2.

[7] 4th Report 1833 at 20.

[8] *Ibid*. at 19-20.

[9] The *Wills Act, 1837*, 1 Vict., c. 26, ss. 14-17.

Sections 12 and 13 of the *Wills Act* incorporate specific provisions dealing with interested witnesses. They provide:

> 12. Where property is charged by a will with a debt and a creditor or the wife or husband of a creditor whose debt is so charged attests a will, the person so attesting, notwithstanding that charge, is a competent witness to prove the execution of the will or its validity or invalidity.
>
> 13. A person is not incompetent as a witness to prove the execution of a will, or its validity or invalidity, solely because he is an executor.

Save for the position of witness beneficiaries, we are of the view that no substantive reform is required. However, the problems posed by executors and creditors in 1837 were the result of the English rule of evidence under which an interested witness was not competent to testify; a rule applied so strictly that at one time an accused at a criminal trial could not take the stand on his own behalf. Since an executor or creditor whose debt was secured by the will had an obvious interest in upholding a will, they were not permitted to testify at common law. This rule has been abrogated by the British Columbia *Evidence Act*, which provides:[10]

> 3. A person is not incompetent to give evidence by reason only of interest or crime.

In the light of this general provision, we see no need for the *Wills Act* to continue to provide for specific cases of interest. Rather, we think that the question of interested witnesses should be dealt with in a general provision, with the sole exception of beneficiaries who act as witnesses.

The Commission recommends that:

12. Sections 12 and 13 of the Wills Act *be repealed and replaced by a provision comparable to the following:*

> *No person is incompetent to act as a witness to a will by reason only of interest.*

B. Testamentary Gifts to Witnesses[11]

1. GENERALLY

Section 11 of the *Wills Act* provides:

> 11 (1) Where a will is attested by a person to whom or to whose then wife or husband a beneficial devise, bequest, or other disposition or appointment of or affecting real or personal property, except charges and directions for payment of debt, is thereby given or made, the devise, bequest or other disposition or appointment is void so far only as it concerns the person so attesting, or the wife or the husband or a person claiming under any of them; but the person so attesting is a competent witness to prove the execution of the will or its validity or invalidity.
>
> (2) A devise, bequest or other disposition or appointment is not void under this section where the will is attested in accordance with section 4 or 5 by at least the number of persons required by those sections and who are not persons within subsection (1).

This section paraphrases an English Act dating from 1752, entitled "An Act for avoiding and putting an end to certain Doubts and Questions relating to the Attestation of Wills and Codicils concerning Real Estates in that Part of Great Britain called England, and in his Majesty's Colonies and Plantations in America."[12] Section 2 of that Act provided, in part:

> If any person shall attest the execution of any will or codicil . . . (made after 24th June, 1752) . . . to whom any beneficial devise, legacy, estate, interest, gift or appointment of or affecting any real or personal estate, other than and except

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[10] R.S.B.C. 1979, c. 116.

[11] This section relies heavily on Appendix "B" of the Report of the Statute Law Revision Committee upon the proposals contained in the *Wills (Interested Witnesses) Bill, 1971*, Melbourne, Victoria, Australia.

[12] 25 George II, c. 6.

> charges on lands, tenements or hereditaments for payment of any debt or debts, shall be thereby given or made, such devise, legacy, estate, interest, gift or appointment shall, so far only as concerns such person . . . or any person claiming under him, be utterly null and void; and such person shall be admitted as a witness to the execution of such will or codicil . . .

This section was not aimed at those who sought by coercion, undue influence or other improper means to secure testamentary benefits for themselves. Rather, as the title of the Act suggests, the section was designed merely to clarify the law concerning competency to act as witness to a will. This doubt arose due to the wording of the *Statute of Frauds*,[13] which provided that wills of land should be void unless "attested or subscribed . . . by three or four credible witnesses." Under the "ancient rule"[14] that interested parties were not competent witnesses, a will witnessed by such a person was invalid. In the words of the Court of King's Bench in *Holdfast & Anstey* v *Dowsing*:[15]

> It was agreed this man could not be examined; how then is he that credible witness which the statute requires?

Contrary to what one might expect, the thrust of the enactment was to validate wills which would otherwise be invalid, and not to invalidate wills otherwise valid. It did so not by directly reversing the "ancient rule," but rather by removing the bar of interest by depriving the legatee of his legacy.

This provision was carried forward into the *Wills Act* of 1837,[16] although that Act deleted the reference to "credible" witnesses. The invalidating provision was extended to include the spouse of an attesting witness. The retention of the ban on an interested witness taking his legacy was justified by the Real Property Commissioners, whose recommendations form the basis of the 1837 *Wills Act*, on the ground that the Commissioners were unwilling to alter the general law of evidence in relation to interested witnesses.[17] This was so notwithstanding that the Commissioners felt that there were weighty arguments against the continuing in force of the provisions of the Act of George II.[18] The Commissioners stated:[19]

> It may be thought that the laws on this subject require alteration. It may be urged that the persons by whom a testator is most usually surrounded when he executes his will, are friends and servants whom he naturally wishes to be witnesses, because he can rely upon their knowledge of his capacity, and their inclination to support his will, and at the same time they are among the persons to whom he is desirous of leaving some token of his remembrance; that the law which excludes the testimony of such persons can have no effect in preventing fraud, for the bribe can be given to a dishonest witness as effectually by a sum of money or a security (which a jury may not be able to discover) or by a codicil, as by a bequest in the will; that where there is a gift to an honest witness, the amount of his interest will appear, and might be taken into consideration by the jury: that the present law has very little of the effect intended by it; that the difference between the interest of a witness who has received his bribe, and of one who expects it is very slight, and that the provision of the statute which makes void the legacy is unjust to him, and never is, and it never will be taken advantage of by respectable parties; that persons who undertake the establishment of false wills are usually aware of the law, and it is therefore no protection against them; and it may in some cases operate with great injustice upon honest witnesses.
>
> It appears to us expedient that wills should be required to be attested by such witnesses as would be admitted unless they subsequently became incompetent, to

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[13] 29. Car II c.3.

[14] *Supra* n. 11 at 11.

[15] *Supra* n. 5.

[16] 7 William IV and 1 Vic., c. 26.

[17] *Supra* n. 7.

[18] *Supra* n. 11 at 11, 12.

[19] *Supra* n. 7 at 19-20.

> give evidence respecting the execution of them. We do not feel ourselves at liberty to suggest alterations in the general rules of evidence, and see no sufficient reason for making the case of wills an exception.

By various Acts[20] the rule rendering interested witnesses incompetent was abolished in England. Nevertheless, the provision barring interested witnesses remained in the English Act, and was adopted in British Columbia in the Revised Statutes of 1897. Prior to that date, the *Wills Act, 1837* was received law.

In 1960, section 11 (2) was added to the Act, in order to avoid barring a legatee's interest where there were two disinterested witnesses. Before the passage of that subsection, it appears clear that the section would apply to bar the interest of even a superfluous witness.[21]

Section 11 of the *Wills Act* has been called a "trap for the unwary"[22] although its existence is such common knowledge and its provisions sufficiently straightforward that it has not spawned a great deal of litigation. Generally, the courts have given the words of the section their natural meaning, even though the result was to invalidate gifts to both the honest and the dishonest. A case in point is the situation considered by Aikins J. of the British Columbia Supreme Court in *Whittingham* v. *Crease & Company*.[23] In this case a solicitor brought a will to the home of the testator to be executed there. By mistake the testator's daughter-in-law, who was the spouse of a major beneficiary, was requested to attest the will. As a result, the beneficiary, a son of the testator, was unable to receive his bequest even though the Court was certain that no improper influence was exercised by the witness. In *Ross* v. *Caunters*,[24] Megarry V.-C. was faced with a case where solicitors forwarded a will to their client for execution but neglected to advise the client not to have a beneficiary's spouse attest it. The husband of the residuary legatee witnessed the will, thereby invalidating the legacy. As in *Whittingham*, the solicitors were held liable in negligence to the disappointed legatee.

The rigidity of the absolute prohibition against a witness receiving any benefit in the will has been criticized in many countries, including Australia, the United States and Canada. An example of this criticism may be found in the comments of one American commentator:[25]

> The essential purpose of the irrebuttable presumption against interested witnesses is to prevent fraud and undue influence. Consequently, the evil to be prevented is overreaching conduct. The presumption envelops all interested witnesses. There currently is no remedy available to the interested witness denied the stated testamentary share. While there could be no statistical data on such a subjective motivation, the presumption is over inclusive in that it undoubtedly penalizes interested witnesses who are innocent. Conceding that the denial of the testamentary share to an interested witness serves to rectify some instances of foul play, it is questionable whether the irrebuttable nature of this presumption equitably or even rationally approaches the problem.

In response to such criticism, legislation has been enacted in some jurisdictions ameliorating the harsh results which flow from the strict application of this rule. A number of different approaches to reform are considered below.

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[20] 6 & 7 Vic. c. 83, section 1; 14 & 15 Vic. c. 99, section 2; 16 & 17 Vic. c. 83, section 1.

[21] *See Re Branda*, [1968] 1 W.L.R. 479, [1968] 1 All E.R. 217 (C.A.). Canadian courts were sometimes more reluctant to void the interest of a superflous witness. In *Re Jones*, (1911) 18 W.L.R. 633 (B.C.S.C.), Gregory J. indicated that if a sufficient explanation was given by the interested witness probate of the will with his name omitted might be granted.

[22] 6th Report of the Law Reform Committee of South Australia to the Attorney-General, at p. 3.

[23] [1978] 5 W.W.R. 45, 3 E.T.R. 97, 6 C.C.L.T. 1.

[24] [1979] 3 W.L.R. 605. *See also Watts* v. *Public Trustee for Western Australia*, [1980] W.A.R. 97 (S.C. Western Australia).

[25] J. B. Mullady: *The Prohibition Against Interested Witnesses Taking Under the Will: An Outdated Doctrine* (1972) 9 Houston L. Rev. 1078 at 1084.

2. ALTERNATIVES FOR REFORM

(a) Repeal the prohibition

One approach has been to repeal the prohibition and permit the witness to receive his bequest. If the witness-beneficiary had exercised any improper or undue influence over the testator, the whole will would be at risk. If there were no undue influence, the whole will would stand. The Law Reform Committee of South Australia[26] has recommended this approach. They were of the opinion that the section as presently drafted served no useful purpose and felt it should be repealed. They also suggested that new provisions be enacted to ensure a thorough investigation of the facts surrounding the execution of the will.

In the United States, a similar solution was adopted by the framers of the Uniform Probate Code,[27] who commented that while they did not want to foster the use of interested witnesses, they wished to prevent penalizing the rare and innocent use of a family member as a witness.[28] They went on to note that any substantial gift to a witness under the will would be a "suspicious circumstance" and could be challenged on the grounds of undue influence.

Although this may be an attractive option at first glance, it does contain two major drawbacks. If the suspicion of undue influence which arises from the fact of a large bequest to an interested witness cannot be dispelled, there is a danger that the whole will would be invalidated and bequests to innocent beneficiaries might fail. In addition, it is not clear that the estate should in every case bear the expense of dispelling the suspicion arising from the attestation of the will by an interested person.

It is true that such a solution would introduce symmetry into the law by eliminating the problem of the interested witness as an anomolous suspicious circumstance which does not have to be dispelled by the person propounding the will. However, the justification in such cases for refusing probate to the whole will is uncertainty as to whether the whole of the instrument in issue represents the testator's true intent. Where an interested witness attests the will, doubt is cast upon his bequest or devise. The suspicion arises because of the conduct of the interested witness in securing his benefit. Where there is undue influence exercised by the witness, that alone does not necessarily impugn the validity of other gifts contained in the will. If such conduct alone resulted in a will being invalid, innocent legatees might be prejudiced.

The real question involves an estimation of the risk involved. It is true that undue influence exercised by an interested witness may taint the whole will. However, we think that the risk of the remaining gifts not representing the testator's true wishes is much less than the risk of frustrating his actual intent to benefit innocent third parties merely because one gift is tainted. If there is evidence which suggests that the whole will may be invalid, it is open to the intestate successors to require the will to be proved in solemn form. At the hearing they would then be able to lead any evidence they possess which throws doubt on the will as a whole.

(b) Substitute the Intestate Benefit

It has been suggested that an interested witness should not receive the whole of the amount of the benefit provided under the will, but should instead be awarded only a portion of it. The beneficiary who attests the will would receive only an amount not exceeding the share which he would have received if the testator had died intestate. The Statute Law Revision Committee of the Australian State of Victoria recommended a similar restriction on the ground that it would eliminate unnecessary injustice without materially impairing the purposes of the section.[29]

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[26] *Supra* n. 22.

[27] The Uniform Probate Code, section 2-505.

[28] Official Comment to the Uniform Probate Code, s. 2-505.

Again, there are limitations to this solution. Primarily, it detracts from the ability to deter fraud. A fraudulent relative may take advantage of such a provision to take a portion of the estate without dispelling the suspicion arising out of his attestation of the will. He may "lie in the weeds" and assert rights under the will if it appears that his fraud will remain undiscovered. There is little merit in awarding a "consolation prize" to a person whose fraud is unsuccessful or whose actions are such that he cannot prove lack of undue influence. We agree with the view expressed by one of our correspondents, who noted:

> The giving of an intestate share to a witness seems to me to have little if anything to recommend it. It is arbitrary, in no way related to the circumstances of a case, and does nothing for the witness who is not an intestate successor.

(c) Provide Relief From Forfeiture of the Bequest

An approach which has attracted considerable attention recently is to retain the prohibition but to create an exception that would allow the bequest to take effect if a judge is satisfied that the witness did not exercise any undue influence. This approach recognizes that the present rule does serve some valid purpose insofar as that it encourages testators to seek out independent witnesses. At the same time, there is a recognition that the rule need not be inflexible. A compromise is reached between voiding the gift automatically and doing away with the prohibition all together.

This is the solution recently adopted by the Province of Ontario.[30] The *Succession Law Reform Act, 1977* provides that a disposition to a witness, his spouse, or a person claiming under them is void unless the Surrogate Court is satisfied that neither the witness nor his spouse exercised any improper or undue influence. This solution clearly puts the onus of establishing the propriety of their conduct on the witness claiming a benefit under the will.[31]

3. RECOMMENDATION

We have concluded that section 11 in its present form can cause considerable injustice. We see no need to deprive a witness/beneficiary of his interest under the will if there is cogent evidence upon which a court may conclude that the testator knew and approved of the gift to the person attesting his will. At the same time, a *prima facie* rule which deprives a witness of his interest under the will is a valuable safeguard against fraud, and we are reluctant to abrogate it without qualification.

We therefore prefer the solution adopted in Ontario. It places a clear onus on the witness to establish that his gift was not the result of fraud or undue influence. If this can be established, we see no reason why the witness should not be treated in the same fashion as any other interested party.

In Working Paper No. 28, we tentatively concluded that a witness be obliged to discharge this onus on the balance of probabilities. That is the standard which generally applies in probate matters, and in particular that standard applies when an executor seeks to dispel any suspicion arising from the circumstances in which a will is executed in order to have a will admitted to probate. As we noted earlier in this Report, the civil standard of proof is not immutable, and the facts tendered as evidence of the testator's intent by a witness will be subject to intense scrutiny if they are out of the ordinary or not easily explicable.

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[29] *Supra* n. 3 at 12.

[30] *The Succession Law Reform Act, 1977*, S.O. 1977, c. 40, s. 12 (3).

[31] Ralph E. Scane, "The Succession Law Reform Act, 1977", Edited Text, March 1978, The Law Society of Upper Canada at 2-3.

Subsection 11 (2) specifically provides for the case of a "superfluous" witness. This provision is justifiable insofar as it is effective to avoid the harsh results which would normally flow from the mandatory application of subsection 1. However, under our recommendation, the application of that subsection is no longer mandatory. We therefore see no reason why a "superfluous" witness should not be required to dispel the suspicion which arises from his attesting the will before he may take any interest under it.

In view of the fact that our recommendation will render section 11 a more flexible tool to deal with the question of an interested witness, we have also considered whether any other class of individual should be included in section 11. We have concluded that a person who signs a will on behalf of an incapable testator should fall within section 11. He is in a fiduciary relationship with the testator, and it is not unjust that he be required to dispel any suspicion surrounding a gift to him.

The Commission recommends that:

13. Section 11 of the Wills Act *be repealed and replaced by a provision comparable to the following:*

11 (1) Where a will is attested, or signed on behalf of a testator, by a person to whom or to whose then wife or husband a beneficial devise, bequest or other disposition or appointment of or affecting real or personal property, except charges and directions for payment of debt is thereby given or made, the devise, bequest or other disposition or appointment is void so far only as it concerns the person so attesting or signing, or the wife or the husband, or a person claiming under any of them.

(2) A devise, bequest, or other disposition or appointment is not void under subsection (1) if the person seeking to uphold it satisfies the court that the testator knew and approved of it.

CHAPTER VI

DESIGNATION OF BENEFICIARIES OF INTERESTS IN FUNDS OR PLANS

A. Characteristics of Plans

The procedure for designating a beneficiary of a life insurance policy is simple. A policy holder may name the beneficiary in the policy itself, by way of a separate independent designation, or in his will. The proceeds of the policy are paid to the beneficiary so named, and do not form a part of the estate. The rules regarding the payment of proceeds under a life insurance policy are not only settled, but also are largely uniform throughout Canada.

Over the past decade, however, there has been an increase in the number of other kinds of plans or funds under which a person may designate a beneficiary. These plans are frequently related to a person's employment, although the goals of the plans may vary. In some plans, profit-sharing and the minimization of taxation are major goals, while others are directed at saving for retirement years or the purchase of a home. A related type of plan may provide accident insurance with a death benefit under which a beneficiary can be designated.

In smaller estates it is not uncommon to find that the value of proceeds payable under such plans far exceeds that of the balance of the testator's assets. It is therefore important that there be some uniformity in the manner in which an interest in such a plan may be transferred. Nevertheless a number of different rules apply to the designation of beneficiaries under these plans, as well as to whether the proceeds of the fund in question fall into the estate. As a result there is considerable confusion concerning the manner in which a beneficiary may be designated. In this chapter we will examine the rules governing different types of plans and review recent legislation on this subject in the Province of Ontario, which has incorporated new rules on such designations into its *Succession Law Reform Act, 1977*.

Prior to outlining the present procedure for designating beneficiaries of interests in trusts or plans, it is useful to examine the nature of such a designation. Arguments have been made that a designation of a beneficiary under a policy is not really a testamentary act, but is more akin to an assignment of the policy, or a trust arrangement for the nominee, or a contract to pay between a member of the plan and its trustees.[1] On the other hand, persuasive arguments can also be made that naming a fund beneficiary is a testamentary act, functionally analogous to a disposition by will. W.F. Nunan has pointed out that there are four fundamental characteristics of such designations which suggest that they are better characterized as testamentary acts:[2]

> (a) the nominee's rights are not vested;
> (b) the employee is free to revoke the nomination at any time;
> (c) the employee is free to deal with his interest in the fund in his lifetime as he pleases (so far as the scheme allows him to do so) despite the fact that he may have made the nomination, and
> (d) the nomination is dependent upon the death of the nominator for its vigour and effect.

In Canada a designation of a beneficiary has been regarded as a testamentary act since 1935. In that year the Supreme Court of Canada held in *Re MacInnes*[3] that the designation of a spouse as beneficiary under an employee's profit-sharing plan was testamentary in nature. Mr. MacInnes had signed a form upon joining the plan naming his wife as the beneficiary of funds standing to his credit in the plan on his death. This form was witnessed by only one person, and therefore failed to comply with the formalities required by the *Wills Act*. As a result the court held that the designation failed and the proceeds of the plan fell into the deceased's general estate. A number of Canadian provinces subsequently enacted legislation providing that a participant in an employment benefit plan could simply sign a designation of a beneficiary without further attestation or formalities,[4] thereby reversing the law laid down in *Re MacInnes*.

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[1] For a discussion of these conflicting views and the relevant cases *see* A. Samuels, *Nomination in Favour of a Nominee to take Effect on Death*, (1967) 31 Convey. 85.

[2] W.F. Nunan, (1966-67) 40 Aust. L.J. 13, 248 and 438 at 15.

[3] [1935] S.C.R. 200.

B. Present Legislation

1. LIFE INSURANCE

A policy holder of a life insurance contract may designate or redesignate a beneficiary of the policy by will or written declaration, although irrevocable designations must be made *inter vivos* and delivered to the insurer.[5] A designation in a will may be effective even though the will is invalid. However, where the will is valid the designation may be revoked along with the will, by operation of law or otherwise, or by a later *inter vivos* designation. If the will is invalid, it is revoked by any act or document which would have revoked the will had it been valid.[6] A testator who is preparing and executing a will may therefore dispose of his assets and his interest in a life insurance policy in one document, without the necessity of using separate forms for each designation.

Except in the case of an irrevocable designation, the *Insurance Act* does not require that an insurer be informed of a designation. It is therefore possible that an insurance company might inadvertently pay the proceeds of a policy to a beneficiary whose interest had been extinguished by a subsequent designation of which the company is unaware. The practice of local solicitors appears to be that if a will is encountered containing a designation of a beneficiary the insurance company is immediately notified. We are advised that in fact few practical problems are posed by the possibility of double designations.[7]

Aside from the safeguards which result from the practice of solicitors in expeditiously giving notice of designations in wills, insurance companies may also rely on section 159 of the *Insurance Act*.[8] It provides:

> **159.** (1) Until an insurer receives at its head or principal office in Canada an instrument or an order of a court affecting the right to receive insurance money, or a notarial copy, or a copy verified by statutory declaration, of the instrument or order, it may make payment of the insurance money and shall be as fully discharged to the extent of the amount paid as if there were no instrument or order.
>
> (2) Subsection (1) does not affect the rights or interests of any person other than the insurer.

Section 200 (1) and (2) similarly protect insurance companies who pay out to named beneficiaries of accident and sickness insurance.

We have concluded that such sweeping protection is unnecessary. It seems unfair that an insurance company should be legally entitled to disregard a court order or an instrument of which it is aware merely because it has not yet received a copy of it at its head office. We have therefore concluded that an insurance company which receives notice of another's rights to the proceeds of a policy at a branch office should pay out at its peril. Modern forms of communication are sufficiently expeditious that we do not think this imposes an undue or onerous burden.

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[4] *See, e.g.*, Ontario, *The Conveyancing and Law of Property Act*, R.S.O. 1970, c. 85, s. 64 (3) and in British Columbia, the *Laws Declaratory Act*, R.S.B.C. 1960, c. 213, s. 38.

[5] *Insurance Act*, R.S.B.C. 1979, c. 200, s. 141, 142. *See also* Hopp, Ronald G., Annotation—*The Designation of Insurance Beneficiaries in a Will* (1978) 2 E.T.R. 223.

[6] R.S.B.C. 1979, c. 200, s. 143.

[7] Correspondence from solicitor, Office of Superintendent of Brokers, Insurance and Real Estate, Ministry of Consumer and Corporate Affairs, April 12, 1979.

[8] *Supra* n. 6, s. 159.

The Commission recommends that:

14. Section 159 (1) and section 200 (1) of the Insurance Act *be amended by amending the phrase "until an insurer receives at his head or principal office in Canada . . ." to read, "until an insurer receives at any of its offices in Canada . . ."*

2. Accident Insurance

Under section 196 of the *Insurance Act*, a designation of death benefits may be made under accident and sickness insurance policies.[9] As in the case of life insurance plans, the designation may be contained in a will. There is one difference between the treatment of beneficiaries under life insurance plans and accident and sickness benefit plans. Whereas the holder of a life insurance plan can designate his beneficiary in a will as of right, the designation of a beneficiary in an accident insurance plan may be made only if the policy does not otherwise prevent it.

The rationale for this distinction is obscure. The provision may have been related to a type of policy marketed 15 to 20 years ago for group plans whereunder survivor benefits were automatically paid to the surviving spouse. We are of the opinion that there is no longer any valid reason for this distinction and that a policy holder should be able to designate a beneficiary as of right, as he can in a contract of life insurance.

The Commission recommends that:

15. The Insurance Act *be amended by deleting the phrase "unless otherwise specified in the policy" from section 196 (1).*

3. Employment Benefit Plans

As we previously noted, the Supreme Court of Canada in *Re MacInnes*[10] held that the document designating a beneficiary in an employment benefit plan must be executed according to the *Wills Act*. As a result, in 1957 the Association of Superintendents of Insurance of Canada requested that the Uniform Law Conference prepare legislation which would enable a participant in a pension plan to name a beneficiary in much the same way that an insured person could name a beneficiary of insurance proceeds. In 1957 the "Rutherford" Uniform provision was adopted by the Conference. Named after the draftsman, G. S. Rutherford, the provision ultimately formed the basis for section 38 of the *Laws and Declaratory Act* in British Columbia.[11] This legislation permits informal designations in employee pension, retirement or profit-sharing plans, if the terms of the plan so provide. The nomination need only be in writing and signed by the employee, and cannot be altered or revoked by a will made after the designation. The employee may only revoke or alter his designation in the manner permitted by the plan. Hence if the plan permits designations by will, the original designation may be made in a will. Any subsequent redesignation or revocation, however, may not be made in a testamentary document. The participant in an employee benefit plan therefore has more limited rights to designate beneficiaries than the holder of an insurance policy.

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[9] *Supra* n. 6, s. 197.

[10] *Supra* note 3.

[11] R.S.B.C. 1960, c. 213, now the *Law and Equity Act*, R.S.B.C. 1979, c. 224, s. 43.

4. Registered Retirement Savings Plans

In 1972 the Trust Companies Association of Canada pointed out that designations under registered retirement savings plans (RRSP) would not be valid unless executed in accordance with the *Wills Act*. They requested the Uniform Law Conference to extend the uniform provisions relating to pension plans to retirement savings plans under the *Income Tax Act* of Canada. As a result, a further section was added to the *Laws Declaratory Act* in 1973 which provided that, if a plan permits the designation of a beneficiary, the designation may be made either in a declaration signed by an annuitant or by will.[12] If an annuitant wishes to change or revoke the designation at a later time, he may do so as of right and in the form of his choice. An annuitant under a retirement savings plan registered under the *Income Tax Act* (Canada) therefore has somewhat broader rights to designate a beneficiary than a participant under an employment benefit plan.

5. Registered Home Ownership Savings Plans (RHOSP)

In 1974 a new form of savings plan was introduced through financial institutions in Canada. These were called Registered Home Ownership Savings Plans and quickly became popular. Annual contributions of up to $1,000 are deductible from income for tax purposes. Most institutions appear to have adopted the same procedures to permit designations of beneficiaries of RHOSP funds as are used in respect of RRSP's. In Working Paper No. 28 we devoted several pages to examining the results which flowed from the absence of any legislation in British Columbia which permitted designations of an interest in a RHOSP by writing without the formalities attendant on the execution of a will. The problems posed by that omission have been partially answered by a recent provision of the *Attorney General Statutes Amendment Act*,[13] which provides:

> **Registered home ownership savings plans**
>
> 46. 1 (1) In this section "registered plan" means a home ownership savings plan that
>
> (a) was created before, or is created after, this section comes into force, and
>
> (b) is registered pursuant to the *Income Tax Act* (Canada).
>
> (2) Where, in accordance with the terms of a registered plan, a person designated a spouse to receive a benefit payable under the registered plan in the event of the person's death,
>
> (a) the designation is effective if it is in writing signed by the person or is contained in a will or other testamentary instrument,
>
> (b) the spouse may enforce payment of the benefit, and
>
> (c) the benefit is not part of the person's estate,
>
> and the provisions of section 143 (1) to (3) of the *Insurance Act* apply to that designation.
>
> (3) A person may from time to time alter or revoke a designation made under a registered plan.
>
> (4) This section does not apply to a designation of a beneficiary to which the *Insurance Act* applies.
>
> (5) This section applies to a designation made before or after this section comes into force but, where the designation was made before this section comes into force, it only applies if the registered plan is still in existence on the date this section comes into force.

This new section will comprise section 46.1 of the *Law and Equity Act*.[14]

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[12] *Law and Equity Act, supra* n. 11, s. 43.

[13] Bill 30, 1981.

[14] Section 46.1 has been proclaimed in force effective July 30, 1981 (B.C. Reg. 307/81).

C. Reform

1. GENERAL

The enactment of section 46.1 of the *Law and Equity Act* has brought about a certain amount of uniformity in the way the more important types of plans are handled. However, the law respecting such designations is not consolidated. Nor do the present provisions necessarily apply to all conceivable types of plans, and we think it important that legislation be enacted which may readily be extended to new forms of plans.

2. THE UNIFORM RETIREMENT PLAN BENEFICIARIES ACT

The Uniform Law Conference of Canada has been interested in the subject of designating employment plan beneficiaries for over 20 years. In 1957, the Conference responded to a request of the Canadian Association of Superintendents of Insurance to consider allowing a participant in a pension plan to name a beneficiary in a manner similar to life insurance plans. As previously noted, in 1957 the Conference approved a draft section which became known as the Uniform Act or Rutherford provision.

In 1975 the British Columbia Commissioners submitted a report to the Conference recommending a revised Uniform Act.[15] As a result the Uniform Retirement Plan Beneficiaries Act[16] (hereinafter referred to as the URPBA) was promulgated in 1975 and has since been adopted in two Canadian provinces.[17] A similar statute has also been enacted in Prince Edward Island.[18]

The general purpose of the URPBA is to enable participants in plans, other than those to which the *Insurance Act* applies, to name beneficiaries in a convenient and consistent manner. Specifically, it permits a participant in a plan to designate a beneficiary by a written and signed statement, or by his will. The text of the URPBA is set out in Appendix E. A number of its provisions require specific comment.

(a) Definition of Participant

A participant is defined as a person who is entitled to designate another person to receive a benefit payable on his death. As a result of this choice of terminology, one Ontario commentator has concluded that for a person to be able to designate a beneficiary of an interest in a plan by his will the plan itself must somehow give him the right to designate "someone." Such an interpretation was not intended by the framers of the provision.

(b) Definition of a "Plan"

A plan under which a person can designate a beneficiary is defined to include a pension, retirement, welfare or profit-sharing fund, and a trust or arrangement for the payment of an annuity for life or a term. Although this definition is intended to be comprehensive, it should be noted that recent enactments in Ontario specifically added RHOSP and RRSP funds to the definition. To avoid uncertainty it would be prudent to follow this definition. We also believe there should be a power to specify, by regulation, additional arrangements that are "plans" for the purposes of the legislation.

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[15] For history of the Uniform Law Conference involvement in designations of beneficiaries *see* text of Report to the Conference set out in Appendix O of the 1975 Proceedings at 164.

[16] 1975 Proceedings of the Uniform Law Conference, p. 30, 178.

[17] Adopted in Manitoba—S.M. 1976, c. 27; and in Ontario—S.O. 1977, c. 40 Part III. Scane, Ralph, *The Succession Law Reform Act, 1977*, Edited Text, L.S.U.C. at p. 11.

[18] *The Designation of Beneficiaries Under Benefit Plans Act*, R.S.P.E.I. 1974, c. D-8.

One of our correspondents noted:

> . . . in section 1 (b) of the Uniform Act it is made clear that the schemes in b (ii) may be schemes created before or after the commencement of the Act. That is not made clear with respect to schemes covered by b (i).

We agree that the manner in which section 1 is framed could lead to such a construction. We see no reason why the Act should not apply to pension and other plans whenever created.

(c) Form of Designation and Revocation

A participant can designate a beneficiary by his will or by an instrument signed by him or on his behalf. A designation contained in a will, however, must make express reference to a plan either generally or specifically. A designation may also be revoked by a simple declaration or by will. A designation or revocation contained in an invalid will is, by reason of section 7, valid notwithstanding the invalidity of the will.

(d) Rights of the Parties

The URPBA provides that the designated beneficiary may enforce payment of the benefit payable to him. This provision is necessary, because the beneficiary is usually not a party to the contract, and at common law he would be unable to bring an action on his own behalf to compel payment.

The URPBA does not contain any protection for the trustees of a plan if they should accidentally pay the proceeds to the wrong person. Such an event could arise where the trustees have one beneficiary designation on file but the testator has changed the designation in a later will. This is in contrast to the *Insurance Act* which provides that until an insurer's head office receives a copy of a document (or court order) affecting the right to receive insurance proceeds the insurer is fully discharged as to the amount paid as if the change did not exist.[19] This protection, however, does not affect the rights of the beneficiary as against anyone else.

When the URPBA was adopted in the Province of Ontario, a provision similar to that in the *Insurance Act* was added to provide protection for the administrators of the plan:[20]

> Where a participant in a plan has designated a person to receive a benefit under the plan on the death of the participant,
>
> (a) the person administering the plan is discharged on paying the benefit to the person designated under the latest designation made in accordance with the terms of the plan, in the absence of actual notice of a subsequent designation or revocation made under section 55 but not in accordance with the terms of the plan; . . .

We have already set out our reasons for concluding that a person liable under an insurance policy should be protected from the consequences of distributing insurance money to the wrong person only if he has not received notice of a competing interest at any of the insurer's offices in Canada. We see no reason why administrators of plans should be entitled to any greater protection under the URPBA.

(e) Republication

We do not think that the URPBA adequately deals with the problem posed by the doctrine of republication. A designation in a will, even if superseded by a later informal designation, may take precedence on the ground that the will speaks from the date of death, and hence the designation in the will is the later of the two. This problem is compounded by cases involving a codicil to the will. A codicil is regarded as republishing the entire will to which it refers. This might have the effect of unintentionally reviving a testamentary designation revoked by an informal designation.

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[19] *See, e.g., supra* n. 8.

[20] *The Succession Law Reform Act, 1977*, S.O. 1977, c. 40, s. 57 (a).

The latter issue arose in *Royal Trust Co.* v. *Shimmin*.[21] The plaintiff in his will directed that all interests in insurance policies should be held in trust for his wife and children. The wife's interest in the trust was limited and contingent. The testator took out a policy of life insurance, in respect of which he made a series of designations, culminating in a designation in favour of the wife absolutely. The testator then executed a codicil to his will, in which he made several minor alterations to his children's legacies. The codicil purported to confirm the will in all other respects. A judgment creditor of the wife's sought to attach her interest in the policy. The trust company resisted, on the ground that the wife's interest in the funds, if any, arose under the will and not by virtue of the designation.

This contention was rejected. Macdonald J. held:[22]

> There is no doubt that a codicil to a will operates as a revival of the will, as if the testator had made a new will at the time. While the will was republished by the codicil and thus for many purposes the date of the original will was, as it were, shifted to the date of the codicil, still the republication did not necessarily make it operate for all purposes "as if it had originally been made at the date of the republishing instrument; a contrary intention may be shown.
>
>> The rule is subject to the limitation that the intention of the testator is not to be defeated thereby:"
>
> *vide* Halsbury's Laws of England, Vol. 28, p. 578.
>
> I have already referred to the intention of the testator as expressed in the declaration of the 18th of July, 1930, and that there is no statement in the codicil that such previous intention has been changed. The "property," so terming the benefits to be derived under the said policy of insurance, had been allocated as between the husband and his wife. I think, in order to destroy the benefits which R.P. Clark had thus intended should be acquired by his wife, a document clearly indicating such intention should have been executed by him. In this connection Lord Campbell in *Hopwood* v. *Hopwood* (1859), 7 H.L. Cas. 728 at p. 737, in referring to the dissenting opinion of Lord Justice Turner, as to whether an instrument executed subsequent to the making of a will operated as an ademption, said:
>
>> I entirely concur "that it is a question of intention, and that the object is to ascertain the intention of the parties."
>
> Though the facts are quite different to those here presented, still this principle is generally applicable. I do not think that the mere republication of the original will has the effect contended for nor that the codicil so intended. If the testator had the intention now submitted he could have so expressed himself. The probability is that he simply intended to make specific bequests referred to in the codicil. . . .

This judgment was affirmed by the British Columbia Court of Appeal.[23]

Section 196 (3) of the *Insurance Act* specifically addresses the former of these two problems. It provides:

> 196. (3) A designation in a will is of no effect against a designation made later than the making of a will.

We think a similar provision should be included in the URPBA.

Section 196 (3) does not, however, deal with republication. We do not think that a codicil should have the effect of reviving a revoked designation unless it expressly so provides. We think, therefore, that both the *Insurance Act* and the URPBA should be amended to provide that a designation in a will superseded by a later designation is not revived by a codicil to the will unless the codicil expressly so provides. This would codify the test suggested by Macdonald J. in *Royal Trust Co.* v. *Shimmin*.

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[21] (1932) 46 B.C.R. 273, [1932] 3 W.W.R. 447, *aff'd* 47 B.C.R. 138, [1933] 3 D.L.R. 718.

[22] At 276 (46 B.C.R.).

[23] *Supra* n. 21.

(f) Recommendation

The Commission recommends that:

16. The Uniform Retirement Plan Beneficiaries Act should be enacted in British Columbia with the following modifications:

- *(a) The definition of "participant" in the Act should clarify that the statute applies whether or not the plan gives the participant a right to designate anyone;*
- *(b) The definition of "plan" should specifically include funds deposited in RRSP's and RHOSP's and any other arrangement designated as a "plan" by regulation;*
- *(c) Section 1 should be reworded to clarify that the URPBA applies to any plan, whenever created;*
- *(d) Administrators of a plan should be discharged upon transferring the benefit contemplated by the plan to the beneficiary of record prior to receipt at any of their offices in Canada of a notice of a change of beneficiary;*
- *(e) A provision similar to section 196 (3) of the* Insurance Act *should be included in the URPBA;*
- *(f) The URPBA should expressly provide that the republication of a will by codicil is not effective to revive a revoked designation in a will unless the codicil expressly so provides.*

17. Upon the enactment of legislation based on the URPBA sections 43, 46 and 46.1 of the Law and Equity Act *should be repealed.*

We are also of the view that a provision similar to that suggested in Recommendation 17 (f) should be included in the *Insurance Act*.

The Commission recommends that:

18. Parts 4 and 5 of the Insurance Act *be amended to provide that the republication of a will by codicil is not effective to revive a revoked designation in a will unless the codicil expressly so provides.*

3. REVOCATION OF DESIGNATIONS

(a) Generally

(i) Insurance

Under sections 143 (3) and 196 (4) of the *Insurance Act*, a designation made in a will is revoked if the will itself is revoked. If the document is ineffective as a will, the designation it contains is revoked if the purported will would have been revoked. Accordingly, a designation in a will attested by only one witness would be revoked by a general revocation clause in a subsequent will.

A designation in a will may be revoked by operation of law. For example, if a man marries after designating his mother in a will not made in contemplation of marriage, the designation would be revoked under section 15 of the *Wills Act*, along with the rest of the will.

An *inter vivos* designation may be revoked in the same manner as it is made. However, neither sections 143 or 196 subject a designation *inter vivos* to revocation by operation of law. In the example given in the previous paragraph, had the designation in favour of the mother been made pursuant to section 141 or section 196 (1) of the *Insurance Act*, it would have survived the marriage.

(ii) RRSP's

Section 46 of the *Law and Equity Act* make sections 143 (1) to (3) of the *Insurance Act* specifically applicable to RRSP's. Accordingly, the position is identical to that of designations under insurance policies. A designation not made in a will cannot be revoked by operation of law.

(iii) RHOSP's

Like section 46, section 46.1 of the *Law and Equity Act* makes section 143 (1) to (3) of the Insurance Act applicable to RHOSP's.

(iv) Employee Benefit Plans

Under section 43 (2) of the *Law and Equity Act*, an employee who has made a designation under an employee benefit plan may not revoke the designation either by will, or by any other means not sanctioned by the plan itself. The designation is not revoked by operation of law.

(v) URPBA

We have recommended that sections 43, 46 and 46.1 of the *Law and Equity Act* be repealed and replaced by the URPBA. Sections 2 through 10 of the URPBA deal with the revocation of designations. They provide:

> **2.** A participant may designate a person to receive a benefit payable under a plan on the participant's death
>
> (a) by an instrument signed by him or signed on his behalf by another person in his presence and by his direction; or
>
> (b) by will,
>
> and may revoke the designation by either of those methods.
>
> **3.** A designation in a will is effective only if it relates expressly to a plan, either generally or specifically.
>
> **4.** A revocation in a will is effective to revoke a designation made by instrument only if the revocation relates expressly to the designation, either generally or specifically.
>
> **5.** Notwithstanding the *Wills Act*, a later designation revokes an earlier designation, to the extent of any inconsistency.
>
> **6.** Revocation of a will is effective to revoke a designation in the will.
>
> **7.** A designation or revocation contained in an instrument purporting to be a will is not invalid by reason only of the fact that the instrument is invalid as a will.
>
> **8.** A designation in an instrument that purports to be but is not a valid will is revoked by an event that would have the effect of revoking the instrument if it had been a valid will.
>
> **9.** Revocation of a designation does not revive an earlier designation.
>
> **10.** Notwithstanding the *Wills Act*, a designation or revocation in a will is effective from the time when the will is signed.

The effect of these provisions is basically to assimilate designations covered by the URPBA with designations of interests in insurance policies. Like such designations, a designation not contained in a will is not revoked by operation of law. In addition, the effect of the URPBA is to provide a measure of uniformity in the manner in which designations in an RRSP, and RHOSP, and an employee benefit plan may be revoked.

(b) Irrevocable Designations

Section 142 of the *Insurance Act* provides that a holder of a policy of life insurance may make an *inter vivos* designation of a beneficiary which is irrevocable except with the consent of the named beneficiary. That section provides:

> **Designation of beneficiary irrevocable**
>
> **142.** (1) An insured may in a contract or by a declaration, other than a declaration that is part of a will, filed with the insurer at its head or principal office in Canada during the lifetime of the person whose life is insured, designate a beneficiary irrevocably, and in that event the insured, while the beneficiary is living, may not alter or revoke the designation without the consent of the beneficiary, and the insurance money is not subject to the control of the insured or of his creditors and does not form part of his estate.
>
> (2) Where the insured purports to designate a beneficiary irrevocably in a will or in a declaration that is not filed as provided in subsection (1), the designation has the same effect as if the insured had not purported to make it irrevocable.

No similar provision is found in Part 5 of the *Insurance Act* in respect of accident and sickness policies. Neither the *Law and Equity Act* or the URPBA provide for irrevocable designations.

(c) Reform

(i) Revocation by Operation of Law

In their current form, both the URPBA and the *Insurance Act* provide that a designation contained in a will is revoked by operation of law, while a designation *inter vivos* is not. Whether designations should be revoked by operation of law raises similar issues to the question of whether a will should be revoked by operation of law.

Earlier in this Report, we canvassed the issues raised by sections 15 and 16 of the *Wills Act*, which provide for revocation of all or part of a will by operation of law. All the Commissioners agree that recommendations respecting the applicability of these sections to designations give rise to issues similar to those of concern in respect of the revocation of wills by operation of law. Hence, although the majority of Commissioners tentatively prefer a scheme whereunder both testamentary and *inter vivos* designations are revoked by marriage, we have concluded that it would be premature to make any formal recommendation to that effect in this Report. In our Report on Statutory Succession Rights, we shall be examining the whole question of the protection to be given surviving spouses. It is possible, for example, that a surviving spouse would be adequately protected by a *Wills Variation Act* application. It is possible that the court could be given the jurisdiction to order that provision be made out of the proceeds otherwise governed by a designation. Until we have settled the rights of a surviving spouse under dependant's relief legislation, we do not think it appropriate to recommend that *inter vivos* designations be revoked by operation of law. Instead we shall address that issue in our Report on Statutory Succession Rights.

(ii) Irrevocable Designations

The right to make a designation irrevocable except with the consent of the named beneficiary is a useful one. This is particularly so in the context of separation agreements. Interests in plans often constitute family assets, and on the breakdown of a marriage it may be a term of the separation agreement that one spouse appoint the other as beneficiary. If that designation could be made irrevocable except with the consent of the spouse named in the designation, it could not be revoked in breach of the separation agreement. We think that this result is desirable.

The Commission recommends that:

19. A provision similar to section 142 of the Insurance Act *be enacted in Part 5 of the* Insurance Act, *and as part of the URPBA*.

CHAPTER VII CONFLICT OF LAWS

A. Introduction

1. The Common Law Position

In a highly mobile society, it is not uncommon for an individual to have connections with more than one country or province. As a result, it is increasingly common for a will to be executed in a form valid under the laws of one jurisdiction with which the testator was connected, but invalid under the laws of another jurisdiction to which he had equally strong ties. It is therefore necessary to choose which law should govern the validity of a will.[1] The rule which originally developed under Canon law was that a will was valid throughout Europe if it conformed to the law of the place of execution. With the secularization of Europe, that unity of principle disintegrated and each country developed its own choice of law rules. It is interesting to note that the advent of the European Economic Community has encouraged new attempts at re-establishing common principles throughout Europe for determining the validity of a will.

The English common law developed its own conflict of laws rules. The formal validity of a will of movables was governed by the law of the place where the testator was domiciled at the date of his death. The validity of a will disposing of an immovable depended on the law of the place where the land or other immovable was located. The strict application of these common law rules meant that many wills were not admitted to probate, even if they were prepared with professional assistance in some other jurisdiction, and even though they undoubtedly expressed the testator's true intent. Nevertheless, section 41 of the *Wills Act* expressly preserves these choice of law rules, subject only to certain exceptions in respect of the formal validity of wills of movables, which we shall discuss later in this chapter.

These rules can on occasion produce startling results. A valid will could become invalid by a change of domicile and then revalidated by the acquisition of a different domicile. Under section 43 of the *Wills Act* a change of domicile alone no longer renders a will invalid. The section is however silent on the question of validating the will by a change of domicile. An American writer, W.F. Frachter, has recently commented on the arbitrariness of these rules:[2]

> . . . [these] hoary common law rules under which the place of execution and the domicile or nationality of the testator at the time of execution have no bearing on the validity of a will . . . [resemble] the equally ancient common law rule that a deed which was fully effective when delivered might become void if the seal should later be eaten away by rats. The common law rules are not well suited to a society in which ownership of property situated in several jurisdictions is common and change of domicile a frequent occurrence.

The narrow choice of laws competent to validate a will at common law led to other problems. The growth of international trade and of the British Empire led to an increasing number of cases where British subjects resident in foreign countries made wills which complied with foreign laws. This put pressure upon the courts and the legislature to devise rules under which those relying on foreign law might not be penalized. Two different approaches to broadening the range of applicable laws resulted. First, the courts looked to the choice of law rules of a foreign jurisdiction, as well as to its domestic law, to uphold a will. This practice is referred to as "*renvoi*."[3] Secondly, since

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[1] Similar problems arise on intestacies: *See generally* J.G. Castel, Canadian Conflict of Laws, Butterworths, Toronto, 1977 at 447 *et seq*.

[2] W.F. Frachter, *The U.P.C. and the International Will* (1968) 66 Mich. L. Rev 469 at 471.

[3] *Renvoi* is examined more extensively, *post*.

1861 there have been several legislative attempts to expand and codify the choice of law rules governing the formal validity of wills.[4] Prior to examining the historical development of the statutory conflict of law rules contained in the *Wills Act*, it is useful to define a number of special terms used in this context.

2. FORMAL AND ESSENTIAL VALIDITY

English law has long drawn a distinction between the formal and essential validity of wills. However entrenched it might be, the distinction raises formidable problems of characterization. Attempts to define the two terms illustrate that a precise definition of either concept is elusive. Jarman, for example,[5] defines essential validity as relating to the "efficacy of testamentary disposition." That begs the question, however, as a formal defect is equally effective to invalidate a will. In default of a precise definition, legal writers have fallen back on merely listing matters considered to be in one category or another. Hence in respect of essential validity, in Theobald on Wills it is stated:[6]

> The term essential validity includes such questions as whether the testator is bound to leave a fixed proportion of his estate to his family, whether legacies to charities are valid, whether gifts are void as infringing the rules against perpetuities or accumulations, whether substitutionary gifts are valid, whether gifts to attesting witnesses are valid, and so on

At the risk of tautology, it is possible to define matters of formal validity as being concerned with the form which a will takes, or its manner of execution. The number of witnesses, a requirement that a will be dated, the location of the testator's signature are all easily characterized as matters of form. In fact, in practice it may be doubted whether this problem often causes concern, since in many cases the characterization of an issue is not difficult. Few would doubt, for example, that the question of whether a person of a certain age has testamentary capacity is a matter of essential validity.

It is apparent even from this short discussion that the question whether a particular rule raises an issue of formal or essential validity is not always an easy one. It raises questions whose resolution is made even more difficult where the rule in issue is one unknown to British Columbia law. Would a requirement that a testator under 21 and over 19 supply two notarial witnesses be a matter of form or substance? Questions of which law is to apply to a given case are not always capable of being resolved by the application of a test whose apparent simplicity masks conceptual ambiguity.

3. MOVABLES AND IMMOVABLES

The terms "movable" and "immovable" were adopted by English courts from the civil law lexicon in order to assist in the determination of rights in cases in which the law of a foreign jurisdiction which does not characterize property as "real" or "personal" is to be applied. For such purposes the courts recognized a division not otherwise known to English law.[7]

The terms "immovable" and "movable" are terms of art. Although similar to the common law concepts of real and personal property, they are not identical. As a result, it is occasionally necessary to decide whether an item of property is to be classified as a movable or an immovable. In the British

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[4] *See*, Donald G. Casswell, *The Conflict of Laws Rules Governing the Formal Validity of Wills: Past Developments and Suggested Reform* (1977) 15 Osgoode Hall L.J., 165.

[5] Jarman on Wills, 8th Edition.

[6] Theobald, Wills, 13th ed., 43-44.

[7] *Re Hoyles, Row* v. *Jagge*, [1911] 1 Ch. 179 (C.A.) at 185 *per* Farwell L.J.

Columbia case of *Barends* v. *Green*,[8] Gregory J. held that a mineral claim was visible, tangible, and so closely associated with a specific parcel of land that it was an immovable. Leases have long been held to be immovables, although at common law they were regarded as chattels real, a form of personalty.[9]

Dean Falconbridge has suggested that the determining factor should be whether convenience dictates that an asset be treated as falling within the rules governing immovables.[10] In British Columbia the determination of whether an asset is an immovable has been made easier by statute. Fixtures and chattels used exclusively in connection with a tract of land are immovables.[11]

4. Scission

The formal validity of a will may depend on the type of asset disposed of by the will. The formal validity of wills disposing of immovables is determined by the law of the jurisdiction in which the immovable is located, while wills disposing of movables were governed at common law by the law of the place where the testator had his domicile at death. The application of the laws of different jurisdictions, according to the type of asset devised or bequeathed in the will, is referred to as "scission."

The present *Wills Act* maintains such a scission between movables and immovables. The common law position regarding an immovable has been carried forward and remains unchanged. The law of the place where the immovable is located determines the formal validity of a disposition of an immovable in the will. The number of laws to which the question of the formal validity of provisions in a will disposing of movables may be referred has been expanded, however, to include any one of the following jurisdictions:

1. The law of the place where the testator was domiciled at the time of his death;
2. The law of the place where the will was made;
3. The law of the place where the testator was domiciled at the time when the will was made;
4. The law of the place where the testator had his domicile of origin.

A will, insofar as it disposes of movables, is valid if it conforms to any one of these laws. The result of this scission in the choice of law rules governing the formal validity of wills is that a will may be valid insofar as it disposes of an immovable, but invalid insofar as it disposes of movables, or vice versa.

5. Renvoi

The rigour of the common law rules respecting formal and essential validity of wills is mitigated to some extent by the doctrine of *renvoi*. Under this doctrine, the English courts would admit to probate a will which, although it did not comply with the law of the testator's domicile at death or the law of the *situs* of an immovable, did comply with a system of law to which reference was made by the conflict rules of the applicable foreign law.

Three factors militated in favour of the adoption of the doctrine of *renvoi*. Firstly, the rigidity of the English choice of law rules, which in the case of movables, permitted reference only to the law of the testator's last domicile often worked unfairly. A will disposing of movables valid when executed could be invalidated by a change of domicile. The will could be revalidated merely by a further change of domicile. Secondly, the more favourable rules relating to such conflicts in neighbouring countries where British subjects often were domiciled influenced the common law courts. Thirdly, the application of the doctrine would result in a will being upheld, a goal which the common law seeks to reach whenever possible.

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[8] (1910-11) 16 W.L.R. 422 (B.C.S.C.) at 427.

[9] *Re Grassi*, [1905] 1 Ch. 584.

[10] Falconbridge on Conflict of Laws, (2nd ed.) at 517.

[11] R.S.B.C. 1979, c. 434, s. 45.

Difficulties with the doctrine of *renvoi* arise from the ambiguity of a reference by a domestic court under the doctrine to the "law" of another jurisdiction. A reference to "law" could be taken to mean only "domestic" law, i.e. the law that a foreign court would apply to a similar case arising for decision before it on facts devoid of conflictual significance. The word, "law" could also be taken to include the relevant conflict rules of the system of law to which reference is made by domestic conflict rules, but without reference to the status of *renvoi* in that foreign system of law. No proof is offered of the status of *renvoi* in the foreign system, and it is assumed that a reference by the foreign law to another "law" means the rules applied in similar purely domestic cases. This is known as "partial", "imperfect" or "receptive" *renvoi*.

A third possible interpretation involves the court placing itself in the position of a foreign court sitting on the case, and resolving the issue with reference to all the rules which that court would apply, including, if appropriate, *renvoi*. This is known as "total," or "double" *renvoi*, or alternatively the "foreign court theory," since the court of the forum is said to put itself in the position of the foreign court in deciding the matter. It involves an obvious problem of the "*circularis inextricabilis*." This would arise if a conflict arose involving the law of a country which also accepts "total" *renvoi*. For example, assuming total *renvoi* to be the applicable rule in both British Columbia and England, the law of British Columbia would refer the matter to English law, which would remit the matter to British Columbia law, which returns the matter to English law, and so on. More complex patterns can be devised using numbers of jurisdictions all of which accept total *renvoi*.

Although the use of the doctrine may in many cases assist in the just resolution of an issue, it can also cause knotty problems of exceeding complexity, and may result in some startling decisions. A case in point is *Re O'Keefe*.[12] In this case the intestate, born in India, died domiciled in the English sense of that term in Italy. Although her father had been born in County Clare, Ireland, she had been there only once in her lifetime, on a short visit. During her life the intestate had lived in France, Spain, Tangier, and the Channel Islands, although she spent her last fortyseven years in Italy. The evidence before the court was that the law of her domicile, Italy, referred the question of succession to the law of her nationality, and in a case where more than one system of law was in force in that nation, to the law of that part to which she belonged. Crossman J. held that that part could only be Eire, where she had her domicile of origin. Accordingly the law of a jurisdiction to which the testator had only been once in her life, and then for only three weeks, governed succession to her property. An express finding was made that the courts in Italy would apply the domestic law of Eire, without regard to its choice of law rules.

The current status of the doctrine of *renvoi* is uncertain. The only English case of appellate authority is *Bremer* v. *Freeman*.[13] In this case, the Privy Council refused to admit to probate the will of a British subject who died domiciled in France in the English sense, but in England in the French sense, on the ground that it was made in English form rather than in French form. Criticism of this judgment is summarized by Dicey and Morris:[14]

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[12] [1940] Ch. 124.

[13] (1857) 10 Moo. P.C.306.

[14] Conflict of Laws, Ninth Edition, at 595.

> Since *Bremer* v. *Freeman* is the only English decision on the renvoi doctrine of appellate authority, it would be a very important case if the judgment were unequivocal; but unfortunately the reasoning is so intricate and so ambiguous that it has been claimed as an authority both for and against the doctrine, and few modern lawyers have the patience to unravel its intricacies.

Early authority indicates that the doctrine provides a rule of alternative reference. In *Collier* v. *Rivaz*,[15] a British subject made a will and six codicils. The will and two codicils were valid as to form by Belgian law, four of the codicils were in English form and invalid by Belgian law. By English law, the testator died domiciled in Belgium. By Belgian law, the testator died domiciled in England. The will and two codicils which were valid by Belgian domestic law were admitted to probate without resorting to *renvoi*. For the remaining codicils, invalid by Belgian domestic law, the court had to go further and applied the total *renvoi* theory to validate the remaining codicils. If the court had to apply total *renvoi* to all of the codicils, some would have been held to be invalid. Although *Collier* v. *Rivaz* was specifically disapproved in *Bremer* v. *Freeman*, the same result was reached in *In Bonis la Croix*[16] where the will was held to be validly altered by codicils made in both French and English forms.

Re Annesley[17] is generally regarded as the first case expressly adopting, albeit reluctantly, the doctrine of total *renvoi* into the common law. Its authority is impaired by Mr. Justice Russell's expressed preference for interpreting "law" as a reference solely to domestic law, his failure to give reasons or cite authority to support its adoption, and the fact that the result in the case would have been the same if the domestic law of France had been applied in the first place. A potential *circularis inextricablis* was avoided by an express finding that a French court would "accept" the reference back from English law and apply its own domestic law.

A similar result was reached in *Re Ross*[18] where the "domestic" option was specifically rejected. A *circularis inextricabilis* was avoided by a finding that Italian law adopted only partial *renvoi*; which led to an application of English law. In the light of the specific rejection of the "domestic" option in *Re Ross*, it is not surprising that it was not argued in *Re Askey*,[19] *Re O'Keefe*,[20] or *Re Duke of Wellington*.[21] In all three cases express findings were made that the foreign law adopted only a partial *renvoi*.

The possibility of absurd results, vexing analytical problems, the confusion surrounding the law, and the desire to enhance the ability of modern testators to execute wills valid in point of form without undue controversy has led to a series of legislative responses to the problems posed by succession cases with foreign elements.

B. Legislative History

1. LORD KINGSDOWN'S ACT, 1861

The *Wills Act, 1861* (often referred to as *Lord Kingsdown's Act*)[22] was enacted in an attempt to eliminate the inconvenience to testators flowing from the imperative application of the *lex domicilii tempore mortis* to wills disposing of movables. It did so by permitting the formal validity of such wills to be determined in accordance with the law of three additional jurisdictions:[23]

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[15] (1841) 2 Curt. 855.

[16] [1877] 2 P.D. 94.

[17] [1926] Ch. 692.

[18] [1930] 1 Ch. 377.

[19] [1930] 2 Ch. 259.

[20] *Supra* n. 12.

[21] [1947] Ch. 506, (*aff'd.* on other grounds [1948] Ch. 506).

[22] 24 & 25 Vict., c. 114.

1. The law of the place where the will was made;
2. The law of the testator's domicile when it was made; or
3. The law of the testator's domicile of origin, if within Her Majesty's Dominions.

It is generally recognized that this Act was not well drafted and contained provisions which severely limited its utility. Only British subjects could benefit from it. The Act only applied to wills made outside of the United Kingdom. A distinction was drawn between domiciles of origin inside or outside of the British Empire. The Act spoke of "personal estate" where "movables" would have been more appropriate.

Lord Kingsdown's Act is of particular interest to us since it is the precursor of section 42 of the *Wills Act*.[24] While the worst features of *Lord Kingsdown's Act* have been removed from that section, section 42 parallels the original 1861 statute. Section 42 of *Wills Act* provides:

> In so far as the manner and formalities of making a will are concerned, a will, so far as it relates to an interest in movables, made without the Province is valid and admissible to probate if it is made in accordance with the law in force at the time of its making in the place where
>
> (a) the will was made;
> (b) the testator was domiciled when the will was made; or
> (c) the testator had his domicile of origin.

The section continues to make an illogical distinction between wills made inside and outside the province. Assume, for example, that a person domiciled in Alberta desires to execute a holograph will disposing of British Columbia movables. Under Alberta law holograph wills are permissible, and if the will was executed in Alberta it would be effective. However, if the will is executed in British Columbia, it would be ineffective unless the testator was domiciled in Alberta at the date of his death.

It is difficult to see any policy which would justify this result. In neither case is British Columbia law complied with and in both cases the same movables are bequeathed. Although to some extent the section penalizes non-compliance with British Columbia law, that has never been the object of our conflicts rules. Our courts have always been willing to refer to the law of another jurisdiction in appropriate cases to determine the formal validity of a will. Section 42 retains the distinction between wills made inside and outside the Province notwithstanding a 1953 revision of *Lord Kingsdown's Act*, accepted by the Conference of Commissioners of Uniformity of Legislation in Canada, in which it was eliminated.

2. THE HAGUE CONVENTION—1961

A Draft Convention on the Formal Validity of Wills was formulated at the Hague in 1961 by the Conference on Private International Law. The two principal goals of the Convention were the promotion of international uniformity of choice of law rules respecting the formal validity of wills, and the validation of wills whenever possible.[25]

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[23] *Ibid*. s. 1.

[24] Notwithstanding the defects enumerated above, the main provisions of *Lord Kingsdown's Act* were re-enacted in British Columbia in 1924. (See S.B.C. 1924, c. 47, s. 2). This enactment retained all the flaws of the original Act, including the drafting flaw which made the Act applicable to "personal property" rather than movables. A similar provision in the Alberta *Wills Act* was labelled by the Conference of Commissioners on Uniformity of Legislation in Canada as "unjust, illogical, and antiquated." (*See* 1928 Proceedings of the Uniform Law Conference of Canada at 297.)

[25] Castel, J.G., *Canada and The Hague Conference on Private International Law 1893-1967*, (1967) 45 Can. B. Rev. 1.

It was the view of the Special Commission which drafted the convention that those objectives could best be served by providing that a will would be formally valid whenever there was some reasonable connecting factor between a jurisdiction under whose law the will would be valid and the testator. An objective test was preferred, on the basis that it would be impractical to require proof of which law the testator intended to govern his will. Moreover, the adoption of a large number of connecting factors would avoid invalidating a will solely because the testator changes his domicile. However, expanding the choice of law rules increases the risk that a will, invalid at the time it was made, might become valid because it conforms by chance with the law of a jurisdiction with which the testator had a reasonable connection only at the time of his death. Nevertheless:[26]

> The majority of the special Commission were of the opinion that the advantages of recognizing connecting factors existing at the time of death outweighed the disadvantages of so doing. Further, the number of cases in which a will would conform 'by chance' with a law which became competent only after the execution of the will and which was totally unconsidered at that time would probably be very few.

The Convention included as relevant laws those in force in the testator's domicile, habitual residence, or those applicable in the country of which he was a national, as well as the law of the place where the will was made. The connecting factors of domicile, habitual residence and nationality were determined either at the time the will was made or at the date of the testator's death. These rules applied to wills disposing of movables or immovables. Moreover, problems with *renvoi* were avoided by specifically providing that "law" meant "internal law."[27]

3. The Wills Act, 1963 (U.K.)

The principles of the Hague Convention were quickly introduced into English law. In 1963, new choice of law rules were introduced in the *Wills Act, 1963*, which repealed *Lord Kingsdown's Act*.[28] The distinction between British subjects and others was abolished, as was the distinction between wills made inside and outside the United Kingdom. *Renvoi* was abolished by permitting reference only to the "internal law" of a foreign jurisdiction. Reference to the *lex rei sitae* was permitted insofar as a will disposed of immovables. In all, eight connecting factors were chosen for wills disposing of movables and nine for wills disposing of immovables.

4. The Uniform Law Conference of Canada

Reforming the law of wills was an early priority of the Uniform Law Conference of Canada. At the first meeting of the Conference in 1918, a committee was established to draft a model *Wills Act*, and by 1929 the first *Uniform Wills Act* had been promulgated. This statute contained a revised version of *Lord Kingsdown's Act* and was subsequently adopted in several provinces.[29]

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[26] *See The Conflict of Law Rules Governing the Formal Validity of Wills: Past Developments and Suggested Reform*, D. G. Casswell, 1977 15 Osgoode Hall L.J. 165 at p. 177.

[27] Article 1 of the Convention provides:
A testamentary disposition shall be valid as regards form if its form complies with the internal law:
(a) of the place where the testator made it, or
(b) of a nationality possessed by the testator, either at the time when he made the disposition, or at the time of his death, or
(c) of a place in which the testator, either at the time when he made the disposition, or at the time of his death, or
(d) of the place in which the testator had his habitual residence, either at the time when he made the disposition, or at the time of his death, or
(e) so far as immovables are concerned, of the place where they are situated.

[28] *Wills Act, 1963*, c. 44, s. 7 (3) (U.K.). (The Act resulted from a combination of the Hague Convention provisions and the work of the United Kingdom Parliamentary Private International Law Committee.)

[29] Uniform Wills Act (1929) Proceedings of the 12th Annual Meeting of the Conference of Commissioners on Uniformity of Legislation in Canada, Quebec (1929) at 37.

In 1953 the Conference amended its uniform conflict provisions. The term "immovables" was deleted in favour of the phrase "interest in land." No distinction was drawn between wills made inside and outside the jurisdiction.[30] When this version of the Uniform Wills Act was enacted in British Columbia in 1960, only one modification was made. The uniform provision which made the statute applicable to wills executed either inside or outside of the Province was deleted. In British Columbia, the conflict of laws provision still only applies to wills "made without the Province."

The *Uniform Wills Act* was further amended by the Conference in 1966 to incorporate provisions from the Hague Convention and from the *Wills Act, 1963*.[31] *Renvoi* was abolished[32] and a wider choice of law provided to determine the formal validity of wills disposing of movables. The internal laws of the following jurisdictions were included as competent to determine the validity of a will insofar as it disposes of movables:[33]

1. The internal law of the place where the testator was domiciled at the time of death;
2. The law of the place where the will was made;
3. The law of the place where the testator was then domiciled;
4. The law of the testator's habitual residence; or
5. The law of the testator's nationality.

Only the Provinces of Manitoba[34] and Ontario[35] have adopted the 1966 amendments to the *Uniform Wills Act*.

5. The Uniform Probate Code—1969

The National Conference of Commissioners on Uniform State Laws included a provision in the Uniform Probate Code regulating the choice of law governing the formal validity of a will.[36] It permits probate of a will if it is in writing and meets the execution requirements of the law of:

1. The place where the will was executed; or
2. The testator's domicile, abode or nationality either at the time of execution or at the time of death.

The Code includes almost all of the competent laws referred to in the English statute. A notable omission is the law of the place where an immovable is situate.

6. Australia

The Australian states of Victoria, South Australia, Western Australia and Tasmania have adopted the provisions of the *Wills Act, 1963*.[37] A Working Paper on succession law recently issued in Queensland also recommends adoption of the English *Wills Act, 1963*.[38]

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[30] The Uniform Wills Act (1953); *see* Bale, G., *The Demise of Lord Kingsdown's Act* (1964) 29 Sask. B. Rev. 179 at 188.

[31] Uniform Wills Act (1966), 1966 Proceedings at 8-9.

[32] Section 38 (c) defined "internal law" so as to exclude the foreign jurisdiction's conflict rules.

[33] S. 40. *See* Proceedings of the Conference of the Commissioners of Uniformity of Legislation in Canada, 1966 at 131 *et seq*.

[34] The *Wills Act*, S.M. 1975, c. 6.

[35] *The Succession Law Reform Act, 1977*, S.O. 1977, c. 40, ss. 34-41.

[36] The U.P.C. at s. 2-506 provides:

> A written will is valid if executed in compliance with Section 2-502 or 2-503 or if its execution complies with the law at the time of execution of the place where the will is executed, or of the law of the place where at the time of execution or at the time of death the testator is domiciled, has a place of abode or is a national.

[37] *See* P.E. Nygh, Conflict of Laws in Australia, (2nd ed. 1971) Butterworths, at 692.

[38] Queensland Law Reform Commission Working Paper on a Bill to Consolidate and Amend the Law of Succession and the Administration of Estates, 1975. Draft Act, Division 3, Sections 22-25.

C. Present Law in British Columbia

1. Capacity

The personal capacity of a testator to make a will disposing of immovables is governed by the law of the jurisdiction in which the immovable is situate. Capacity to make a will disposing of movables is governed by law of the domicile of the testator at the time the will was made.[39]

2. Formalities

The *Wills Act* contains express choice of law rules. It provides that the manner and formalities of making a will relating to an "interest in land" are governed by the law of the place where the land is situate. A will disposing of an interest in movables is governed by the law of the testator's domicile at the time of his death.[40] In addition, if the will was executed outside British Columbia, it would be formally valid if made in accordance with the law in force at the time of its making in the jurisdiction where it was made, or the law of the jurisdiction where the testator was domiciled when the will was made, or the law of the testator's domicile of origin.[41]

3. Essential Validity and Effect

The essential validity and effect of a will in so far as it disposes of an interest in land is governed by the law of the place where the land is located. The relevant law governing the essential validity of a will disposing of an interest in movables is the law of the place where the testator was domiciled at the date of his death.[42] The British Columbia *Wills Act* retains the technically incorrect term "interest in land" rather than "immovable". This usage is incompatible with generally accepted terminology.

4. Construction

A court faced with difficulties in interpreting the language of the will may have to choose between domestic and foreign rules of construction. Section 44 of the *Wills Act* permits the court to apply the law of the testator's domicile at the time the will was made. Section 44 does not, however, restrict the court to that choice of law and other choices are possible, depending upon the testator's experience and intent. The *prima facie* rule favouring the law of the domicile when the will was made applies to interests in land as well as to interests in movables. In the case of land, however, the law of *situs* would prevail if the interest arising from the construction intended by the testator is not permitted or recognized by that law.[43]

Section 43 of the *Wills Act* provides that if a testator changes his domicile after making a will its construction would not thereby be altered. Professor Castel has concluded that this provision applies to dispositions of movables as well as to interests in land.[44]

D. Reform

It is evident that there has been considerable interest in the conflict of laws rules governing formal validity over the past two decades. The result is that there is very little uniformity of legislation. In fact, a recent plea for uniformity in legislation suggested that the English *Wills Act, 1963* should be followed in Canada:[45]

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[39] Professor Castel suggests that to adopt any other rule would be absurd since at the time of making his will the testator cannot foresee where he will be domiciled at the date of his death. Castel, *supra* n. 1 at 450.

[40] The *Wills Act*, R.S.B.C. 1979, c. 434, Part III, s. 41.

[41] *Ibid*. s. 42.

[42] *Supra* n. 40.

[43] *Per* Cheshire & North, Private International Law, (8th ed.) 1970 at 490-4.

[44] *Supra* n. 1 at 466, (although he referred to "movables/ immovables.")

> . . . the sooner the provinces of Canada enact uniform legislation regarding the conflict of laws rules governing the formal validity of wills the better. That uniform legislation should resemble the *Wills Act, 1963* (U.K.) . . .

In the remainder of this chapter we will recommend that a revised set of conflict of laws rules be enacted, based on the models provided by the English *Wills Act, 1963*, the *Uniform Wills Act* and the *Uniform Probate Code*.

1. GENERALLY

(a) Movables Related to Land

Section 45 of the *Wills Act* provides that where a movable is so intimately connected with land that its use in connection therewith comprises its value, succession to it under a will or on an intestacy is governed by the law of the place where the land is situated.[46]

In 1966 the British Columbia Commissioners to the Uniform Law Conference of Canada suggested that the reference to intestacy in this section be deleted on the grounds that it should not be part of a statute dealing with wills.[47] This suggestion was subsequently adopted and the *Uniform Wills Act* has been revised by deleting that reference,[48] although the old wording is still in force in British Columbia. We are of the opinion that, except for the reference to intestacy, the provision is useful and should be retained.

The Commission recommends that:

20. The reference to intestacy in section 45 of the Wills Act *be deleted.*

(b) Renvoi

Under the doctrine of *renvoi*, where the "law" of a foreign jurisdiction is in issue, a court may refer to the conflict rules of the foreign jurisdiction as well as it is purely domestic law. The doctrine has been the source of much confusion. Its application, content, and even its very existence are uncertain. The *Wills Act, 1963* has ended this uncertainty in England by providing that a reference to foreign law is to be construed solely as a reference to internal law. This solution was also recommended by the Uniform Law Conference[49] and has been implemented in Manitoba and Ontario.[50] "Internal law" in relation to any place has been defined to exclude the choice of law rules of that place. We are of the opinion that this policy should also be adopted in British Columbia. The injustice that *renvoi* was designed to mitigate is better remedied by a broader selection of applicable laws.

The English *Wills Act, 1963* defines "internal law" as follows:

> 'internal law' in relation to any territory or state means the law which would apply in a case where no question of the law in force in any other territory or state arose.

The Commission recommends that:

21. The doctrine of renvoi *be abolished in respect of the formal and essential validity of wills by permitting reference to the internal law of a foreign jurisdiction only. "Internal law" should be defined to exclude the choice of law rules of the foreign jurisdiction.*

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[45] Casswell, *supra* n. 4 at 214.

[46] The *Wills Act, supra* n. 40, s. 45.

[47] 1966 Proceedings of the Conference of the Commissioners on Uniformity of Legislation in Canada, 131.

[48] The Uniform Wills Act (1966) s. 43, now enacted in Manitoba (s. 43) and Ontario (s. 40.)

[49] Recommended by Professor Castel at 1966 Proceedings, p. 131 and adopted by The Uniform Law Conference. Ontario and Manitoba have both since provided for abolition of the doctrine.

[50] The Uniform Wills Act, s. 44 (1), subsequently adopted in Ontario by s. 41(1) of *The Succession Law Reform Act, 1977*, S.O. 1977, c. 40, and in Manitoba by S.M. 1975, c. 6, s. 44 (1).

(c) Wills Made Inside British Columbia

Section 43 of the *Wills Act* distinguishes between wills made inside and outside the province. This distinction, inherited from *Lord Kingsdown's Act*, is criticized earlier in this chapter. The distinction was abolished in England in 1963. We can discern no reason for continuing to exclude wills made in the Province from the benefit of the expanded choice of law rules.

The Commission recommends that:

22. The choice of law rules should apply to wills made within British Columbia as well as to those made in other jurisdictions.

(d) Special Foreign Requirements

The Uniform Law Conference of Canada has recommended that where an external law is to be applied in interpreting a will, any special requirements to be observed by testators of a particular description, or any special qualifications required of witnesses, are to be treated as formal requirements. We believe this recommendation should be adopted in British Columbia, as it precludes any debate on whether such matters are questions of formal or essential validity.

The Commission recommends that:

23. Where a law in force outside of British Columbia is to be applied, any requirement that:

- *(a) special formalities are to be observed by testators of a particular description; or*
- *(b) witnesses to a will are to have certain qualifications;*

should be treated as a formal requirement only.

(e) Construction of Wills

Section 44 of the *Wills Act* permits resort to be had to the law of the testator's domicile at the time of making the will in order to aid in the construction of a disposition by will of an interest in land or movables. The rule is not mandatory, and other laws may be referred to where appropriate. We consider this to be both sensible and flexible and we do not propose any change.

(f) Jurisdictions With More Than One Legal System

On occasion a British Columbia court may be referred to the law of a foreign jurisdiction in which more than one legal system is in force. The state may be federal. Alternatively, it may be a unitary state which applies different rules to its citizens dependent on matters such as religion, ancestry, or residence. It is not unknown, for example, for a state to regard a polygamous marriage as valid if contracted between Muslim citizens, and void if contracted by Christian citizens.

As a result, where a British Columbia court is referred to the law of such a jurisdiction, a question will arise concerning which system of law should be applied. The English *Wills Act, 1963* solves that problem in the following manner:

> 6 (2) Where under this Act the internal law in force in any territory or state is to be applied in the case of a will, but there are in force in that territory or state two or more systems of internal law relating to the formal validity of wills, the system to be applied shall be ascertained as follows:-
>
> (a) if there is in force throughout the territory or state a rule indicating which of those systems can properly be applied in the case in question, that rule shall be followed; or

> (b) if there is no such rule, the system shall be that with which the testator was most closely connected at the relevant time, and for this purpose the relevant time is the time of the testator's death where the matter is to be determined by reference to circumstances prevailing at his death, and the time of execution of the will in any other case.

This solution is a sensible one, which we think might be conveniently adopted in British Columbia.

The Commission recommends that:

24. A provision similar to section 6 (2) of the Wills Act, 1963 *be enacted in British Columbia.*

2. Choice of Law

(a) Formal Validity

An individual may have connections with numerous jurisdictions during his lifetime. He may be domiciled in one state, be a national of a second, and habitually resident in a third. In deciding which connecting factor should be appropriate to indicate a proper choice of law to determine the formal validity of a will, an objective standard is the only practical alternative. It would be impractical to attempt to determine in every case with which laws the testator might have been reasonably familiar. The question in most cases will be a matter of conjecture.

A number of objective connecting factors can be advanced as relevant to the formal validity of a will:

(i) The Place Where the Will was Made

The law of the place of execution is recognized as a competent law by the majority of existing legal systems. Although the testator might not have any real connection with the place where he executes his will, he may have sought legal advice concerning the form of will required in that jurisdiction prior to its execution. It is reasonable for him to follow such advice.

(ii) Domicile or Habitual Residence at Time Will Made

It is likely that a testator would be familiar with the requirements of the law of his domicile at the time his will was made, although this is not always the case. Domicile is a highly technical concept, and for that reason the law of habitual residence was included in the Hague Convention as an alternative choice. The testator in many cases will be much more familiar with the form of will required in his habitual residence than he would be with the form required by his domicile.

(iii) Domicile or Habitual Residence at Death

It has long been thought that a testator would probably be familiar with the laws of his domicile at death. It is even more likely that he would be aware of the laws of his habitual residence at the date he died.

(iv) Law of the Place Where Property Located

It is possible that a testator would be familiar with the formal requirements of a jurisdiction in which he owned immovables. It is not nearly so likely that a testator would be familiar with the laws of each jurisdiction in which he had movables. It may even be unclear in which jurisdiction an intangible movable is situated.

Three different approaches may be taken to the issue of whether the law of the place where the property is situate should be competent to determine the formal validity of a will. For example, the *Wills Act, 1963* (U.K.) provides that it is relevant for immovables but not for movables, and thus maintains a slight scission in their conflict rules. The recent Ontario amendment similarly provides that the place where the asset is situate is a connecting factor for an interest in land but not for movables.

In Working Paper No. 28 we proposed a second approach: that of abolishing any reference to the *lex situs* in respect of either movables or immovables. We have been persuaded, however, that such a proposal cannot be justified. One of our correspondents wrote:

> As I understand it, the *lex rei sitae* is to be rejected, even so far as immovables are concerned, for two reasons: (a) the connection between the place where the immovable is located, but where the testator is neither resident nor domiciled, is thought to be too remote to justify upholding a will by that place's law; and (b) to maintain the scission between provisions of a will dealing with movables and those dealing with immovables "results in the complete disruption of the testator's scheme of distribution." I must admit I'm not convinced by eiter of those reasons. Dealing with (a), it seems to me that a testator might very reasonably make a will in conformity with the law prevailing in the jurisdiction where he had real estate. It is at least as reasonable as conforming with the law of the place where the testator fortuitously happens to be when he makes his will, which your proposals would allow him to do. A testator might make a separate will disposing of his real estate, deliberately conforming with the local requirements; even such a will would be struck down under your proposal, if the will were made outside the jurisdiction where the immovable was, and the testator was neither habitually resident nor domiciled in that jurisdiction. As to reason (b), I would suggest that the testator's scheme of distribution has already been disrupted as soon as any part of the will is held formally invalid. The question is whether it should be disrupted totally, as under the proposal in the Paper, or only partially, as it would be if at least the provisions dealing with immovables could be upheld under the *lex rei sitae*. I think partial disruption is better than complete disruption.

If the *lex rei sitae* is to be retained in respect of immovables, the result is a scission. A will may be valid insofar as it disposes of immovables, and invalid in respect of movables. We think it undesirable to preserve such a distinction, and hence have concluded that the *lex rei sitae* should apply to both movables and immovables. We are not persuaded by the objection that determining the *situs* or character of a movable may be difficult. The result of relying on the *lex situs* is to validate a will and implement the testator's intent. The benefits outweigh the risk of confusion.

A difficult question may still arise where movables and immovables disposed of by the will are situate in different jurisdictions. If the formal rules which apply in the two jurisdictions are different, and if the will would not be valid under any other relevant foreign law, the result may be a "limping" will — i.e., one valid for some purposes and not for others.

In a recent article,[51] D.G. Casswell has examined the issues surrounding the choice of the *lex situs* as a governing law for both movables and immovables. As Casswell notes, the location of property within a jurisdiction is in most cases an indication of a reasonable connection with a jurisdiction. However, in other cases the presence of a movable in a jurisdiction may be fortuitous. We do not think this possibility alone warrants the rejection of the *lex situs* as a governing law in respect of the formal validity of wills of movables.

Casswell explores two solutions. He preferred validating the whole of the will if it disposed of an immovable in accord with its *lex situs*. In other words, a will disposing of movables situate in British Columbia would be recognized as valid if it conformed to the law of Saskatchewan, in which the testator owned a farm which he devised in his will, even though the will did not conform to British Columbia law or the law indicated by any other choice of law rule. Under this option the entire will would be regarded as valid if the will conformed to the law of any one immovable devised in it. We have concluded that this option should not be adopted. If a movable is situate in British Columbia, and the will is not valid under our law, we do not think our courts should be obliged to give effect to it solely on the basis that the will complies with the *lex situs* of any immovable devised in the will. There is no reasonable connection between the movables and the foreign law governing the immovable.

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[51] *Supra* n. 4 at 214.

Casswell's other option is to regard a will as valid in its entirety if it disposes of any one movable or immovable in accordance with the law of its *situs*. The results could be ludicrous. A will disposing of a multi-million dollar British Columbia estate could be validated by a disposition of a bicycle located in an Edmonton garage. We agree with Casswell's conclusion that this option is untenable.

On the whole, we prefer permitting the validity of each disposition to be judged according to the law of the place where it is situate. It is true that the result may be a limping will. However, in view of the wide choice of alternate laws to which reference may be made under our recommendation, the risk of creating a limping will is small.

Unlike immovables, the *situs* of movables may change. A movable may be located in different jurisdictions at the time the will was made and at the testator's death. We think the testator has a reasonable connection with either jurisdiction, and the *lex situs* at either date should be effective to validate a disposition.

(v) Domicile of Origin

The law of the testator's domicile of origin has been criticized as being too remote. It was excluded from the Hague Convention and the English *Wills Act, 1963* on this ground. It was rejected by the Uniform Law Conference in 1966 on the same ground.

(vi) Nationality of Testator

The law of the country of which the testator was a national, or the *lex patriae*, has been included as a competent law in some jurisdictions. England, several Australian States and the Uniform Probate Code have adopted nationality either at the time the will was made, or at the death of the testator as appropriate connecting factors. The *Uniform Wills Act* refers to the nationality of a testator at the time the will was executed, but permits reference to the testator's national law only if there was in that place one body of law governing the wills of nationals. In Recommendation 25, we set out a means of choosing an appropriate system of law where more than one system of law is in force. We therefore see no need for a similar limitation in a British Columbia *Wills Act*.

In Working Paper No. 28 we rejected nationality as a connecting factor on the ground that it was too remote. However, the comments we received concerning proposal 22 of the Working Paper have convinced us that nationality is a reasonable connecting factor. One correspondent wrote:

> Omitting the law of the nationality as one of the alternatives is again justified on the ground that, as a connecting factor, nationality is too remote. But is it any more remote than the *lex loci actus*? Many immigrants from Europe are accustomed to taking nationality more seriously than Canadians do, and I can't see that their complying with their *lex patriae* is so unreasonable that the will should be struck down as a result.

> In short, I don't see any good reason why we shouldn't adopt the formal validity choice of law rules that Ontario has. Since the thrust of the rest of the Paper is in favour of upholding wills wherever possible, I think the Conflicts provisions should include all reasonable laws as alternatives for judging the will's formal validity.

We have concluded that compliance with the lex patriae, either at the time the will was executed or at the time of death, should be sufficient to validate the will. Otherwise, a testator who is of the view that nationality is important may be misled by relying upon the law of his nationality immediately prior to his death to determine the validity of his will. On the other hand, a testator may be aware that his will was invalid, but unaware that his change of citizenship might validate it. On the whole, we do not find the second case to be a practical problem. Most testators would not be content to leave a will intact and rely on its invalidity at law. We think that revocation should be the result of a conscious and overt act. On balance, we prefer to validate wills where possible.

(vii) The Lex Fori

In British Columbia, the *lex fori*, or the law of forum, consists of provincial and federal statutes, and the rules of common law and equity. If a will were to be admissible to probate on the ground that it complies with the *lex fori*, courts in British Columbia would be entitled to admit wills to probate if they complied with our own *Wills Act*.

In this Report we recommend two systems of wills: the retention of the formal will, derived from the English *Wills Act, 1837*, and informal wills admissible to probate under our dispensing provision. Should any will be admissible to probate if it conforms to British Columbia law, even though it does not conform to a foreign law otherwise relevant by British Columbia choice of law rules? We have concluded that courts in British Columbia should be permitted to give effect to such wills where probate is required in British Columbia. In such a case, we think the main issue should be whether the documents is one to which our courts might safely give effect. If the will contains the formal safeguards required by our law, then we think it safe to permit the will to govern the disposition of the testator's estate.

The choice of the *lex fori* as a governing law may be criticized on the ground that the testator might have no reasonable connection with British Columbia. We do not find this point persuasive. The purpose of insisting on formalities at all is to ensure that a testamentary instrument may safely be acted on. A liberal choice of law regime has as its end not to compel compliance with any particular law, but rather to permit the testator to comply with any form he might reasonably regard as binding. That end does not preclude giving effect to other forms of disposition if the court is convinced the document in issue represents the testator's wishes.

In particular, we think that the court should be permitted to resort to the dispensing power we recommended earlier in this Report even if the defect in form is the result of a failure to comply with a foreign law. We see no reason to be more solicitous of foreign law than of our own.

We raised the issue of whether a British Columbia court should be permitted to dispense with foreign formalities in an appropriate case with one of our correspondents. He replied:

> The problem about using the remedial provision to "cure" a will that would be formally invalid under the conflicts rules is an interesting one. For that problem to arise, you would have to have property—movable or immovable—in B.C. (otherwise a B.C. court wouldn't be involved), and a will executed outside B.C. by a testator who was neither domiciled nor habitually resident in B.C. when he

> made the will or when he died; and the will would have to be formally invalid under the law(s) of the jurisdiction(s) where the testator was domiciled or habitually resident when he made the will and when he died, as well as under the law of the place of execution. The problem would be restricted to movables if the *lex rei sitae* were retained as a relevant law in the case of immovables, because, as you point out in your letter, if B.C. law is applicable as being the *lex situs* of the immovables, the remedial provision can be applied as part of B.C. law.
>
> So if we confine it to movables, the typical situation where the problem you mention comes up is where there are, say, shares in B.C. owned by a testator who has always lived elsewhere, e.g. in Germany, and who makes his will in Germany, and the will is invalid under German law. Should a B.C. court be able to say that the shares are nevertheless validly disposed of by that will, on the ground that the testator intended the document to have testamentary effect? The only argument I can see against it is that the B.C. court will be distributing movables inconsistently with what the court of the domicile would do. But that is a risk that already exists, because B.C. conflicts rules relating to formal validity may differ from those of the domicile, so that a B.C. court may uphold a will that is rejected by the courts of the domicile, and vice-versa. (That risk would be (marginally) enhanced by abolishing the use of renvoi as a device to secure (usually illusory) uniformity). So I think that in the odd case where the testator has failed to comply with any of the relevant laws on formal validity, but a B.C. court can be persuaded that the document was intended to have testamentary effect, there is no compelling reason for refusing to uphold the document by applying the remedial provision.

As our correspondent noted, our earlier adoption of the *lex situs* for both movables and immovables will restrict the number of cases where express reference to the *lex fori per se* will be necessary. In many cases, British Columbia law will be the *lex situs*. However, in some cases the *lex situs* rule we recommend could result in a "limping will." In such a case, a reference to the dispensing power could permit a British Columbia court to give effect to the balance of the will.

The Commission recommends that:

25. Section 42 of the Wills Act *should be repealed and replaced by provisions comparable to the following:*

42 (1) Insofar as the manner and formalities of making a will are concerned, a will is valid and admissible to probate if made in accordance with the internal law of:

- *(a) the jurisdiction where the will was made*
- *(b) the testator's domicile, either at the date the will was made or at the date of his death, or*
- *(c) the testator's habitual residence, either at the date the will was made or at the date of his death, or*
- *(d) a country of which the testator was a national, either at the date the will was made or at the date of his death, or*
- *(e) British Columbia.*

2. A disposition of an interest in movables or immovables contained in a will which does not conform to a law whose choice is authorized by this Act is valid if it conforms to the law of the place where the property is situated, either at the date the will was made or at the date of death.

Section 42 of the current *Wills Act* permits the court to refer only to foreign law as it stood at the date the will was executed. The court is compelled, therefore, to ignore changes in the foreign law even if expressly intended to validate wills. The English *Wills Act, 1963* adopts a more flexible approach. Section 6 (3) provides:

> 6 (3) In determining for the purposes of this Act whether or not the execution of a will conformed to a particular law, regard shall be had to the formal requirements of that law at the time of execution, but this shall not prevent account being taken

> of an alteration of law affecting wills executed at that time if the alteration enables the will to be treated as properly executed.

We think that British Columbia courts should have a similar power.

The Commission recommends that:

26. A provision comparable to section 6 (3) of the English Wills Act, 1963 *be enacted in British Columbia.*

(viii) Special Cases

The *Uniform Wills Act* recognizes three situations which call for special choice of law rules.[52] Wills made on board aircraft or vessels, wills revoking earlier wills, and wills exercising a power of appointment are singled out for special treatment.

Section 40 (2) of the *Uniform Wills Act* provides:

> (2) Without prejudice to subsection (1), as regards the manner and formalities of making a will or an interest in movables, the following are properly made:
>
> (a) a will made on board a vessel or aircraft of any description, if the making of the will conformed to the internal law in force in the place with which, having regard to its registration (if any) and other relevant circumstances, the vessel or aircraft may be taken to have been most closely connected;
>
> (b) a will so far as it revokes a will which under this Part would be treated as properly made or revokes a provision which under this Part would be treated as comprised in a properly made will, if the making of the later will conformed to any law by reference to which the revoked will or provision would be treated as properly made;
>
> (c) a will so far as it exercises a power of appointment, if the making of the will conforms to the law governing the essential validity of the power.

Subsection 40 (1) sets out choice of law rules for formal validity.

Subsection 2 (a) deals with an unusual case. A person in an aircraft or vessel who seeks advice on making a will is likely to be advised of the formalities which apply in the jurisdiction with which the aircraft or vessel is most closely connected. Seeking such advice is reasonable, and effect should be given to a will executed in reliance upon it.

It is not uncommon for individuals to exercise a power of appointment by will. We think that the exercise of such a power in a will should be as effective as if exercised *inter vivos*. Hence we agree that the exercise of the power should be effective if it conforms to the law governing the power's essential validity.

We shall canvass the effect of subsection 40 (2) (b) later in this Report in our discussion of revocation in the conflict of laws.

The Commission recommends that:

27. A provision comparable to section 40 (2) (a) and (c) of the Uniform Wills Act *be enacted in British Columbia.*

(b) Essential Validity and Effect

At common law the material or essential validity of a will insofar as it disposes of an interest in movables is governed by the law of the testator's domicile at the time of his death. The essential validity of a will disposing of an immovable is governed by the law of the place where the property is situate.

These provisions were added at the 1929 Conference of Commissioners on Uniformity of Law in Canada in order to state the general rules then thought to govern questions of both formal and essential validity at common law. It was thought that a codification of the current law would "make intelligible the subsequent provisions."[53] Unfortunately, the characterization of a matter as one of essential or formal validity is not such a simple matter. The Conference appears to have been under the impression that the items affecting the essential validity of a will could be specified with a high degree of certainty: a position in respect of which we have expressed some doubts in this Report.

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[52] *The Uniform Wills Act*, 1966, s. 40(2). Subsequently enacted in Manitoba as s. 40(2) and in Ontario by s. 37(2) of *The Succession Law Reform Act, 1977*, S.O. 1977, c. 40.

The confusion concerning the definition of "essential validity" is reflected in the changing terminology used in the proposed *Wills Act*. The 1929 Uniform provision refers to "the validity and effect of the will," while a later version specifies the "intrinsic validity and effect." We note that the recent amendments in Ontario have further modified the term to read "essential validity and effect" of a will.

The attempts to codify the common law rules were made prior to reform in other parts of the world. Since that time conflict of laws statutes have been enacted in England, Australia and the United States. In none of these jurisdictions was it felt necessary to attempt a codification of choice of law rules affecting essential validity. We have also been unable to locate a case in which this statutory provision has been considered in Canada.

The impermanence of a movable may justify expanding the range of competent laws on the question of essential validity and effect. On the other hand, there is a cogent reason for not expanding the range of competent laws concerning the validity of the disposition of an immovable. Restricting the governing law to the place where the immovable is situate avoids importing unsuitable foreign rules relating to landholding. It is apparent that a scission in the treatment of movable and immovable property must be retained.

(i) Immovables

The law governing the essential validity and effect of a will disposing of an immovable in British Columbia is the law of the place where the land is situated. We are of the opinion that this single connecting factor in general should govern the validity of wills insofar as they dispose of immovables. Any other solution could give rise to anomalous and inconvenient tenures.

(ii) Movables

The law governing the essential validity and effect of a will disposing of a movable in British Columbia is currently the law of the place where the testator was domiciled at the time of his death. Should the number of competent laws be expanded as far as movables are concerned? If the testator had a reasonable connection with a particular jurisdiction which would validate a proposed disposition in a will then it could be given effect by a British Columbia court. Of course the connection might also prohibit the gift.

It may be questioned whether the factors justifying a broad choice of law rule in respect of formal validity are operative in respect of essential validity. The expanded choice of law rules available to determine the formal validity of a will are meant to serve the principle of *favor testamenti*. A search is made in order to find a jurisdiction whose laws will validate the will. The rules are of alternative reference: compliance with the law of any one jurisdiction so chosen will validate the will. However, in respect of essential validity there is no policy as overriding as *favor testamenti* which militates in favour of a rule of alternative reference, nor is there any clear criteria by which to guage which jurisdiction's laws should be preferred in the event of conflict. Some jurisdictions have adopted "wait and see" provisions in regard to the Rule Against

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[53] *See* Falconbridge, Memorandum of the draft of Section 14 of the Draft Wills Act of 1926, (1929) Report of the Conference on Uniformity of Legislation, 321.

Perpetuities, some have not. Other jurisdictions have "forced share" or matrimonial home provisions for family members. If the laws of more than one jurisdiction are potentially applicable to determine the validity of a will, different classes of beneficiaries could be forced into litigation over the question of which laws were to govern. It may not be apparent from the facts of such a case that any forum's rules were preferable, or that any jurisdiction would be primarily concerned with the matter.

We are of the opinion that the choice of laws governing the essential validity and effect of a will should not be expanded or codified. The common law rules are to some extent arbitrary, but in the absence of a specific set of facts in which their application would work an injustice, we see no reason to legislate alternate choices. We think these rules may safely be left to the common law.

The Commission recommends that:

28. The choice of law provisions in the Wills Act *should not make reference to the intrinsic (or essential) validity and effect of a will.*

3. "IMMOVABLE" VS. "INTEREST IN LAND"

Earlier in this Report we noted that the term "immovable" was a term of art in conflicts cases. Recent statutes have abandoned the term in favour of "interest in land." We see no advantage to this change in terminology.

The Commission recommends that:

29. References to an interest in "land" should be deleted from the choice of law provisions of the Wills Act *and replaced by references to an interest in "immovables."*

E. Revocation in the Conflict of Laws

The legal principles involved in this issue are particularly intractable. In Dicey and Morris the following comment may be found:[54]

> The question what law determines whether a will has been revoked is one of considerable nicety and does not appear to have received much discussion except as regards revocation by subsequent marriage.

Revocation of a will occurs when one of the three necessary preconditions is fulfilled: the execution of a later document either expressly revoking the will or inconsistent with the will; revocation by exception of law (e.g. revocation on marriage), or by destruction *animo revocandi*.

1. REVOCATION BY EXPRESS INSTRUMENT

Dicey and Morris suggest that the effect of such an instrument falls to be determined by the same rules which govern the formal and essential validity of all testamentary instruments,[55] a position with which Castel agrees.[56] The Manitoba *Wills Act*[57] expressly provides that a will is properly made:

> So far as it revokes a will which under this Part [conflict of laws] would be treated as properly made or revokes a provision which under this Part would be treated as comprised in a properly made will, if the making of a will conformed to any law by reference to which the revoked will or provision would be treated as properly made.

The position under current British Columbia law is unsettled. Section 14 (1) of the *Wills Act* provides that a will is revoked only by (*inter alia*) another will "made in accordance with the provisions of this Act" or a writing declaring an intention to revoke "made in accordance with the provisions of this Act governing the making of a will." That would undoubtedly include the conflict of laws provisions of Part 3 of the *Wills Act*. However the Act is silent on the question whether the later revocation must conform to the foreign law chosen to validate the will being revoked, or the law governing the second will in which the revocation clause is contained. The better view appears to be, on the wording of the statute, that compliance with the foreign law applicable to the second will is necessary.

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[54] Dicey & Morris, The Conflict of Laws, Ninth Edition, at 615.

[55] *Ibid.* at 618-9.

[56] Castel, Canadian Conflict of Laws, vol. 2, at 619.

[57] Section 40 (2) (b).

The Uniform Wills Act provides in section 40 (2) (b) that a will is properly made:

> . . . so far as it revokes a will which under this Part would be treated as properly made or revokes a provision which under this Part would be treated as comprised in a properly made will, if the making of the later will conformed to any law by reference to which the revoked will or provision would be treated as properly made . . .

A similar provision was enacted in Ontario as section 37 (2) of the *Succession Law Reform Act*.

The effect of this provision is to expand the choice of laws by which a revocation contained in a will is rendered effective. The revocation will be effective if the will in which it is contained is effective, or alternatively if it complies with any law which would validate the prior disposition. Assume, for example that a testator domiciled in Utopia makes a valid Utopian will, which does not comply with any other law suggested by British Columbia choice of law rules. He later becomes domiciled in Ruritania, where he executes a second will which conforms to Utopian, but not Ruritanian law. Under current British Columbia law, a court could not give effect to the second instrument. However, under section 40 (2), the second will is effective, if only to revoke the prior will. The testator would, therefore, die intestate.

We have nevertheless concluded that subsection 40 (2) should be adopted in British Columbia. Where a new will containing a revocation clause is executed, the obvious intent of the testator is to revoke the former will. Although we can only speculate what the testator might have done had he realized the second will was invalid, we have as an established fact that he considered his first will no longer appropriate. In such a case the revocation of the earlier will should more often conform to the testator's wishes. We admit the possibility that the result might be an intestacy, even though the testator has executed two wills. On the whole we think that to be preferable to giving effect to a will which the testator has attempted to revoke.

A will may revoke by implication provisions in earlier wills with which it is inconsistent, although in all other respects the earlier will remains in force. The effect of such a later will is a question of construction,[58] and in line with our earlier view that the choice of law rule set out in the *Wills Act* respecting construction of wills, we feel that no specific recommendation is called for.

The Commission recommends that:

30. A provision comparable to section 40 (2) (b) of the Uniform Wills Act *be enacted in British Columbia.*

2. REVOCATION BY DESTRUCTION

Castel, agreeing with Dicey and Morris, states:[59]

> Whether a will is revoked by burning, tearing or otherwise destroying the same by the testator or by someone in his presence and by his direction with the intention of revoking the same should be governed by the law of the testator's domicile at the

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[58] *Supra* n. 56, at 619.

[59] *Supra* n. 56, at 467.

> date of the alleged act of revocation in the case of movables, and by the *lex rei sitae* in the case of immovables.

Dicey and Morris note that there is no authority for this point, but nevertheless tentatively put forward this view as a rule.[60] The lack of authority on this point indicates not only that the issue is not contentious, but also that any proposal for reform would be premature.

3. REVOCATION BY OPERATION OF LAW

In British Columbia the marriage of a testator is currently the only change of circumstance which revokes an entire will. A contrasting problem is that posed by the breakdown of a marriage by an event described in section 43 of the *Family Relations Act*, which may under section 16 of the *Wills Act* result in the revocation of a portion of a will. Problems may arise where the law of a foreign jurisdiction stipulates that a will is revoked by a change of circumstances not having such an effect by British Columbia law. Such authority as there is suggests that the *lex domicilii tempore mortis* should govern in the case of movables, and the *lex rei sitae* for immmovables.[61] In view of the lack of case authority on the effect of such other changes of circumstances, we have concluded that any conflict between competing laws concerning revocation by change of circumstances does not pose practical problems requiring resolution by legislation.

A particular problem arises in cases where foreign law does not provide that a will is revoked by marriage. The issue of the effect of marriage on a will presents a primary problem of characterization. Case law supports the view that the matter is best characterized as a rule of matrimonial law. In the case of *In re Martin*[62] Lord Justice Vaughan Williams held[63]:

> . . . I think that the rule of the English law which makes a woman's will null and void on her marriage is part of the matrimonial law, and not of the testamentary law, and that probate of this will ought not to be granted; but as I am not sure that we ought to infer that there was at the time of the marriage an agreement that the English law should govern the matrimonial property, I prefer to ground my judgment on the change of the husband's domicil at the time of marriage; and I think that, if he did change it from a French to an English domicil, then his subsequent reversion to a French domicil will not prevent English law continuing to govern the matrimonial property.

This characterization has been adopted in Canada,[64] notwithstanding some criticism from Falconbridge,[65] who thought that the consequences of this classification were:

> . . . inconvenient and undesirable insofar as they may involve probable diversity in the distribution of the assets situated in different countries, belonging to the estate of a decedent, as between [Ontario] on the one hand, and some other country, as for example, [Quebec], the domestic law of which does not contain a rule that a will is revoked by the subsequent marriage of the testator, and in the law of which a foreign rule of this kind may be characterized as being testamentary, and (2) some other country, as, for example, a state of the United States of America, the domestic law of which contains a rule similar to or identical with the [Ontario] rule, but in the law of which the rule is characterized as one of testamentary law.

However, characterizing the matter as one of succession law will not result in a resolution of the issue, as the only result would be to put British Columbia law out of step with the rule in force in the other common law provinces. For that reason the result would not be necessarily more just. We do not therefore make any recommendation to resolve the issues raised by the characterization of this rule as one of matrimonial law.

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[60] Dicey & Morris, *supra* n. 54, rule 109 at 615.

[61] *Re Howard*, [1924] 1 D.L.R. 1062 at 1071.

[62] [1900] P. 211.

[63] Ibid. at 240.

[64] *Seifert* v. *Seifert*, (1914) 23 D.L.R. 440, 32 O.L.R. 433.

[65] Cited in Castel, *supra* n. 56 at pp. 467-468.

The choice of law rule respecting revocation by marriage appears to be settled. A will is revoked by marriage if the husband's domicile would so regard it. The husband's domicile is crucial insofar as the wife gains the same domicile on marriage as a domicile of dependency. Such a domicile of dependency is generally regarded as outmoded, but it nevertheless still exists in Canada for purposes other than divorce. In England, a wife has, since January 1, 1974 been able to acquire an independent domicile, and her domicile after marriage is determined by the same factors as her husband's.[66] The result of this development must be the re-examination in England of *In Re Martin*, which depends for its consistency upon the notion of the domicile of dependency. If the wife has an independent domicile, there seems little reason to prefer the husband's domicile over hers in determining the effect of the marriage, and hence there is no basis for determining which domicile is to govern.

We feel that the concept of a domicile of dependency is archaic. Its abolition in other jurisdictions will in time erode whatever benefits flow from uniformity of approach to the effect of marriage. The choice of domicile as a connecting factor places undue emphasis on the technicalities of the law concerning domicile. The Commission feels therefore that the choice of a different connecting factor is justified.

The connecting factor must be one common to both parties, or the possibility of an irresolvable conflict between the laws chosen in respect of each party to the marriage may result. The law of the place of marriage fills that requirement, but in many cases may be fortuitous. Common habitual residence presumes that the parties have lived together for some time in one jurisdiction, which may not be the case if one spouse dies soon after the marriage. A test is required which allows an immediate determination of the rights of the parties.

Recently, in a case concerning capacity to contract a polygamous marriage, Mr. Justice Cumming Bruce, adopted the law of the intended matrimonial home.[67] This choice of law rule could be applied in a different context to determine the effect of marriage on a will. However, it raises as many problems as it solves. Must the intent actually be fulfilled? When does it expire? What if the parties never addressed their minds to the issue?

The infinite variety of factual situations which may arise, combined with the fact that it is still open to Canadian appellate courts to devise rules other than domicile at the time of marriage, and the fact that a test which will produce fair results in all cases is difficult to articulate, all militate against a legislative response. The development of the law in this area could more usefully proceed on a case by case basis, where a judge may have regard to all the facts of a case. We have therefore concluded that in the circumstances legislative reform is inappropriate, and hence make no recommendation.

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[66] *Domicile and Matrimonial Proceedings Act*, 1973, s. 1.

[67] *Radwan* v. *Radwan* 2, [1973] Fam. 24, [1972] 3 W.L.R. 735, [1972] 3 All E.R. 967.

CHAPTER VIII SAFEKEEPING AND REGISTRATION

In the past decade, increased attention has been paid to the subject of the safekeeping and registration of wills. Some jurisdictions have adopted compulsory registration schemes requiring wills to be deposited for safekeeping. In fact, in Europe an international convention on a scheme of registration of wills was recently settled. In this chapter, we shall examine the present scheme in effect in British Columbia and compare it to other statutory models.

A. The Present System in British Columbia

The *Wills Act*[1] permits a testator to file a Wills Notice without charge in a central registry operated by the Provincial Government.[2] This scheme was instituted in 1945. Unlike some schemes, no provision is made for filing the will itself, and filing of a Wills Notice is not mandatory. The Wills Notice, a copy of which is reproduced Appendix A, merely specifies the current location of a will, or records a change in its status. Supplementary notices may be filed by testators respecting revocations[3] or changes in the location of the will.[4] Failure to file, or the filing of a notice does not affect the validity of the will.[5] A survey of a number of legal systems made by the English Law Commission in 1966 indicates that the British Columbia scheme for registering Wills Notices contains several unique features.[6]

The system operates quite simply. When a solicitor prepares a will, a notice specifying its location may be forwarded to the Wills Registry. The Registry has a computerized indexing system under which the existence of a notice is recorded. After the death of a testator an executor or administrator must institute a search for a notice. A certificate will be issued[7] certifying whether any Wills Notices have been filed with the Registry. This certificate is then filed by the executor or administrator with the District Registrar of the Supreme Court prior to any application for probate.[8] We are advised that since filing of this certificate on probate applications became compulsory, wills have been located which otherwise would have gone unnoticed.

The surprisingly high volume of registrations in the Wills Registry belies criticisms of voluntary systems. In 1971 there were 19,250 notices of wills filed. Four years later this figure had doubled to 37,275, and in 1978 46,217 notices were filed with the Registry. These figures are impressive in light of the relatively small population of the Province and the fact that the scheme is not advertised. Another significant statistic is the number of positive responses to searches. The Wills Registration Division of the Vital Statistics Branch has indicated that in 1971 there were four times as many negative as positive responses issued. In 1978 the office issued 12,450 negative certificates and 7,255 positive certificates. One expects that in the future the number of positive responses will continue to increase.

The *Wills Act* only permits registration of a Wills Notice. It does not permit a testator to file the will itself, as is the case in a number of other jurisdictions. The Wills Registry nevertheless receives a number of original wills each year from testators, which it returns by registered mail.

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[1] Part II of the *Wills Act*, R.S.B.C. 1979, c. 434, ss. 33 to 40.

[2] The Director of Vital Statistics is designated as the office responsible for notices and certificates.

[3] *Supra* n. 1, s. 34.

[4] *Ibid*. s. 35.

[5] *Ibid*. s. 36.

[6] The Law Commission, Should English Wills be Registrable? (Working Paper No. 4, 1966).

[7] *Supra* n. 1, s. 38 (3).

[8] Reg. 121/61 (July 25, 1961).

B. Recent Developments in Other Jurisdictions

1. EUROPE

In Europe a number of countries have central filing systems to facilitate the location of wills after the death of the testator. In Denmark there is a central registry of all wills made before a notary public,[9] and in the Netherlands the registration of wills has been compulsory since 1918. Under Dutch law no will is valid unless it has been deposited with a notary in the presence of witnesses.[10]

In England, the Law Commission concluded in 1966 that a system of compulsory registration would be desirable:[11]

> While one cannot pretend that the present position in England is so unsatisfactory as to cry out for a remedy as a matter of urgency, we think that public dissatisfaction is unlikely to die away and public opinion may come sooner or later to accept the need for the setting up of some machinery to ensure that wills are not overlooked, to diminish the chances of their being suppressed and to do away with the time consuming and expensive searches and advertisements which solicitors now have to put in train.

In 1966 the Council of Europe, concerned about the increased mobility of testators since the advent of the Common Market, recommended that the Committee of Ministers instruct the European Committee on Legal Co-Operation to investigate the possibility of a registration system for wills. Six years later the Convention on the Establishment of a Scheme of Registration of Wills[12] was signed in Basel, Switzerland (the "Basel Convention").[13]

The purposes of the Basel Convention are concisely set out in its preamble:[14]

> Wishing to provide for a registration scheme enabling a testator to register his will in order to reduce the risk of the will remaining unknown or being found belatedly, and to facilitate the discovery of the existence of this will after the death of the testator;
>
> Convinced that such a system would facilitate in particular the finding of wills made abroad, . . .

The Convention requires registration in a signatory state of two types of wills. These can generally be classified as formal wills and, with the testator's consent, holograph wills.[15] There is a minimum level of information which must accompany a request for registration.[16] The Convention also provides for the establishment of a national body to receive requests for information and to arrange for registrations in other countries.[17]

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[9] *Supra* n. 6 at 7.

[10] *Ibid*. The Law Commission reports that apparently in practice no dispute ever arises about the authenticity of a will and that the system has won general approval.

[11] *Ibid*.

[12] May 19, 1972. *See* Council of Europe, European Treaty Series No. 77. We have been advised that the Convention came into force on March 20, 1976. To date it has been signed by Belgium, Cypress, France, The Netherlands, Turkey, Denmark, Germany, Italy, Luxembourg, Portugal, and the United Kingdom. Only the first five countries have ratified it to date.

[13] Information on the Treaty may be obtained from the Director of Information, Council of Europe, 67 Strasbourg, France.

[14] The Convention at 1.

[15] *See* Article 4 for specific wording of the requirements.

[16] *Ibid*. Article 7 which provides:

The request for registration shall contain the following information at least:
(a) Family name and first name(s) of testator or author of deed (and maiden name, where applicable);
(b) Date and place (or, if this is not known, country) of birth;
(c) Address or domicile, as declared;
(d) Nature and date of deed of which registration is requested;
(e) Name and address of the notary, public authority or person who received the deed or with whom it is deposited.

[17] *Ibid*. Article 3.

2. THE UNITED STATES

Provision is made in many states for the safekeeping of a will during the testator's lifetime. Most of these schemes feature complex administrative procedures governing the confidentiality of the will, the form of receipts, and fees. In contrast, the Uniform Probate Code merely provides for the deposit of a will, and leaves questions of administration to the local Rules of Court.[18]

No specific provision is made in the Uniform Probate Code for the development of a central filing system for depositing wills or Wills Notices. The commentary contained therein, however, suggests that it may be desirable to develop a central index in the United States. The rationale put forward for such a system is that as citizens become more mobile the likelihood that a testator will not die in the jurisdiction where his will is deposited increases.[19]

In 1973 the Diplomatic Conference on Wills held in Washington, D.C.[20] (at which the terms of the International Will were decided upon) passed a resolution[21] recommending to the States which participated at the Conference,[22] that they establish a system to facilitate the safekeeping, search and discovery of an international will.[23]

In 1977 the National Conference of Commissioners on Uniform State Laws considered a will registration system and suggested that two factors would encourage the development of a system in the future.[24] General acceptance of the international will would mean that testators would come to rely on a single will to dispose of their property, wherever located. Secondly, the increasing mobility of individual testators would create a need for new methods of safekeeping and locating wills.[25]

The Conference promulgated an optional section of the Uniform Probate Code providing for international will information registration.[26] It is distinguishable on a number of points from the earlier section of the Code providing for the deposit of wills. In particular, the will itself is not deposited, only information respecting international wills is accepted, and the scheme is voluntary. We are not aware of any American jurisdiction which has adopted these new proposals as of this date.

3. CANADA

Three of the four provinces which adopted the Convention providing a Uniform Law on the Form of an International Will enacted legislation requiring the establishment of a compulsory registration system.[27] In two of the provinces, the legislation is in force[28] and in one, it is awaiting proclamation.[29]

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[18] The Uniform Probate Code S2-901 which provides in part:

> A will may be deposited by the testator or his agent with any Court for safekeeping, under rules of the Court. The will shall be kept confidential. During the testator's lifetime a deposited will shall be delivered only to him or to a person authorized in writing signed by him to receive the will.

[19] U.P.C. Comment to Sec. 2-901 at 67.

[20] *See* K. Nadelmann, *The Formal Validity of Wills and the Washington Convention 1973 providing the Form of an International Will* (1974) 22 Am. J. Comp. Law 365.

[21] For text *see* Nadelmann, *ibid*. at 383; *see also* Report on the International Convention Providing a Uniform Law on the Form of the International Will, Ontario Law Reform Commission (1974) at 29.

[22] Canada and the U.S.A. were participants.

[23] The resolution refers to the Registration Convention contained in Appendix H as an example to be followed.

[24] 1977 Proceedings of the 86th National Conference of Commissioners on Uniform States Laws at 358.

[25] *Ibid*. at 363.

[26] Section 2-1010, Uniform Probate Code which provides (in part):

> The [Secretary of State] shall establish a registry system by which authorized persons may register in a central information center, information regarding the execution of international wills, keeping that information in strictest confidence until the death of the maker . . .

[27] Manitoba, Alberta and Newfoundland.

[28] Alberta and Newfoundland.

[29] Manitoba.

Only in Alberta, however, has such a scheme actually been implemented.[30] These statutes require that where a member of the law society has acted during any month in respect of an international will he must file certain information with a Registrar before the 10th day of the following month.[31] Although filing is compulsory, the failure to file does not affect the validity of the will.[32] The legislation enables the Attorney General to establish either a "registration" system or a "registration and safekeeping" system. In Alberta, the regulation provides for both safekeeping and registration.[33]

In Ontario, legislation does not specifically require registration of international wills. However a deposit system has been operative for some time.[34] A person may voluntarily deposit his will for safekeeping with the local Surrogate Court Registrar on payment of a nominal fee. Although this scheme has been in existence for some time, it is apparently rarely used.[35] Frequency of use may be increasing however, since we understand that some community clinics which prepare wills recommend their deposit as a matter of course.

A study of a similar system for the deposit of wills in England[36] noted that the system was being almost completely ignored.[37] This is surprising in view of the experience of the Wills Registry in this Province, where testators sometimes submit original wills although not encouraged to do so.

The Board of Notaries of the Province of Quebec has established a sophisticated and comprehensive system for the registration of information concerning wills. Of the three forms of will permitted in Quebec,[38] the most common form, authentic wills, requires the presence of a notary.[39] Under the *Notaries Act* the Board of Notaries maintains a central register of wills[40] to which all notaries must file a report each month showing the number of wills executed *en minute*.[41] Failure to file a report is an offence for the notary who thereby becomes liable to pay a fine.[42] The failure to file the requested information does not affect the validity of a will. We are advised by the Board of Notaries that since 1961 they have registered 1.5 million wills and have made around 40,000 searches for wills. In the past year, for example, there were 114,292 registrations and 5,684 searches.[43] This compulsory registration service is operated and controlled by the profession and not directly by the provincial government.

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[30] In Alberta, as of March 1, 1979, the Public Trustee has been designated to maintain the register. In Newfoundland we are advised that a system is to become operational in the near future. In Manitoba, we are advised that it will be at least a year before implementation is considered.

[31] Manitoba: S.M. 1975, c. 6, s. 59 (1);
Alberta: S.A. 1976, c. 57, s. 55.
Newfoundland: S.N. 1975-76, c. 23, s. 41.

[32] *See, e.g.*, S.M. 1975, c. 6, s. 59 (2).

[33] Alberta O.C. 116/79, Feb. 6, 1975.

[34] *The Surrogate Court Act*, R.S.O. 1970, c. 451, s. 17 provides:

> The office of the registrar is a depository for all wills of living persons given to him for safekeeping, and the registrar shall receive and keep the same upon payment of such fees and under such regulations as are prescribed by the surrogate court rules.

[35] At a 1953 symposium on Wills and the Administration of Estates a leading member of the Ontario Estate Bar commented that he had had never heard of anyone using the deposit provision. (1953) 31 Can. B. Rev. 353 at 366. This may be changing, however, with the advent of community legal clinics. In view of the transient natures of their clientele, clinic personnel are encouraged to deposit wills.

[36] Section 172 of the *Supreme Court of Judicature (Consolidation) Act 1925* provides that: "There shall, under the control and direction of the High Court, be provided safe and convenient depositories for the custody of the wills of living persons, and any person may deposit his will therein on payment of such fees and subject to such regulations as may from time to time be prescribed by the President of the Probate Division."

[37] The Law Commission, Should English Wills Be Registrable? (1966) Working Paper No. 4 at 6.

[38] The English (or formal) will, the holograph will and the authentic will. (*Civil Code*, Article 842).

[39] Wills in notarial or authentic form can be made either before two notaries or a notary and two witnesses. (*Civil Code*, Art. 843.).

[40] *The Notaries Act*, R.S.Q. 1964, c. 70, as amended, s. 138.

[41] *Ibid*. s. 141a; *see also* By-laws of the Chamber of Notaries, s. 2.01.

[42] *Ibid*. s. 141c.

[43] Letter from Secretary to Chambre des Notaires du Quebec to Law Reform Commission, March 13, 1979.

C. Conclusions

In any jurisdiction requiring compulsory registration, there exists some body with the power to control one of the participants in the execution process. In Alberta, lawyers assist in preparing international wills. In Quebec and Holland notaries prepare "authentic" wills. These groups are subject to control by their governing professional bodies, which ensure compliance with compulsory registration requirements.

Under the scheme in force in British Columbia, a person is free to make his will in private without the involvement of the legal profession. Thus, to impose a registration requirement as a condition of validity could be regarded as a serious inroad on this freedom. Compulsory registration also rouses the spectre of the citizens in the Province having to file in a central system personal and confidential information. For this reason, we cannot support a compulsory regime of will registration, and are of the opinion that the present system should be continued as a voluntary one. We are buttressed in our view by the comment we received respecting a similar conclusion in our Working Paper. It would appear to us that there is no need at this time for, or any interest in, a compulsory registration scheme.

CHAPTER IX SUMMARY OF RECOMMENDATIONS

A. Recommendations

1. Section 7 of the Wills Act *be amended by deleting "is under the age of 19 years" and substituting "is under the age of majority." (Page 18)*

2. Section 7 of the Wills Act *be amended by:*

(a) adding the words "subject to subsection (5)" to subsection (1), and

(b) adding subsections comparable to the following:

(4) A minor may apply to the Supreme Court for a declaration that he has testamentary capacity notwithstanding that he has not reached the age of majority.

(5) Subsection 1 does not apply to:

(a) a will made by a minor pursuant to a declaration made under subsection 4;

(b) a will made by a minor which is expressed to be made in contemplation of his marriage if

(i) the will names the intended spouse, and

(ii) the marriage subsequently takes place; or

(c) a will made by an officer or man of the regular force of the Canadian Forces.

(6) Nothing in subsection 5 shall derogate from the power of the court to refuse probate of a will on a ground other than the minority of the testator. (Page 23)

3. (a) Sections 5 and 7 (1) (b) of the Wills Act *be repealed.*

(b) The repeal of sections 5 and 7 (1) (b) should not invalidate any will that was validly made under the law in force when it was made.

(c) Section 7 (2) be amended by deleting "for the purposes of section 5 and of this section."

(d) The words "subject to section 5" be deleted from section 4 of the Wills Act. *(Page 29)*

4. (a) Section 4 be amended by deleting "or signed in his name by some other person in his presence and by his direction."

(b) A new section comparable to the following be added to the new Wills Act*:*

For the purposes of this Act, anything signed by a person in the testator's presence and at his direction, in

(i) the testator's own name,

(ii) the name of the person directed to sign by the testator, or

(iii) in both names,

takes effect as if signed by the testator. (Page 30)

5. The Wills Act *be amended by adding a section comparable to the following:*

Dispensing Power

Notwithstanding section 4, a document is valid as a will if

(a) it is in writing,

(b) it is signed by the testator,

(c) the testator dies after this section comes into force,

and the court is satisfied that the testator knew and approved of the contents of the will and intended it to have testamentary effect. (Page 54)

6. The definition of "will" contained in section 1 of the Wills Act *be amended to include a document valid as a will under Recommendation 5. (Page 54)*

7. The Convention Providing a Uniform Law on the Form of an International Will should be adopted in British Columbia. (Page 59)

8. Legislation similar to Part III, section 45 (a), (b) and (c) to section 51 of the Uniform Wills Act, *be enacted in British Columbia. (Page 60)*

9. Members of the Law Society of British Columbia and Notaries Public enrolled pursuant to section 7 of the Notaries Act *be designated as authorized persons under Part III of the* Uniform Wills Act. *[See* Notaries Act, *Bill 28, 1981, section 9]. (Page 62)*

10. Section 17 be amended to read as follows:

17 (1) An alteration made in a will is of no effect, except to invalidate words or meanings it renders no longer apparent, unless the alteration:

- *(a) is made in accordance with the provisions of this Act governing the making of a will; or*
- *(b) is signed by the testator; and*
    - *(i) the testator dies after this subsection comes into force, and*
    - *(ii) the court is satisfied that the testator knew and approved of the alteration, and intended it to have testamentary effect.*

(2) For the purposes of subsection (1) (a), an alteration that is made in a will is validly made when the signature of the testator and the subscription of any witness which is required, are made

- *(a) in the margin or in some other part of the will opposite or near to the alteration; or*
- *(b) at the end of or opposite to a memorandum referring to the alteration and written in some part of the will. (Page 65)*

11. Section 14 of the Wills Act *be amended by the addition of a provision comparable to the following to subsection (1):*

- *(e) any other act of the testator, or of a person by his direction and in his presence, if:*
    - *(i) the consequence of the act is apparent on the face of the will, and*
    - *(ii) the court is satisfied that the act was done with the intent of the testator to revoke all or part of the will. (Page 69)*

12. Sections 12 and 13 of the Wills Act *be repealed and replaced by a provision comparable to the following:*

No person is incompetent to act as a witness to a will by reason only of interest. (Page 75)

13. Section 11 of the Wills Act *be repealed and replaced by a provision comparable to the following:*

11 (1) Where a will is attested, or signed on behalf of a testator, by a person to whom or to whose then wife or husband a beneficial devise, bequest or other disposition or appointment of or affecting real or personal property, except charges and directions for payment of debt is thereby given or made, the devise, bequest or other disposition or appointment is void so far only as it concerns the person so attesting or signing, or the wife or the husband, or a person claiming under any of them.

(2) A devise, bequest, or other disposition or appointment is not void under subsection (1) if the person seeking to uphold it satisfies the court that the testator knew and approved of it. (Page 80)

14. Section 159 (1) and section 200 (1) of the Insurance Act *be amended by amending the phrase "until an insurer receives at his head or principal office in Canada . . ." to read, "until an insurer receives at any of its offices in Canada . . ." (Page 83)*

15. The Insurance Act *be amended by deleting the phrase "unless otherwise specified in the policy" from section 196 (1). (Page 83)*

16. The Uniform Retirement Plan Beneficiaries Act should be enacted in British Columbia with the following modifications:

- *(a) The definition of "participant" in the Act should clarify that the statute applies whether or not the plan gives the participant a right to designate anyone;*
- *(b) The definition of "plan" should specifically include funds deposited in RRSP's and RHOSP's and any other arrangement designated as a "plan" by regulation;*
- *(c) Section 1 should be reworded to clarify that the URPBA applies to any plan, whenever created;*
- *(d) Administrators of a plan should be discharged upon transferring the benefit contemplated by the plan to the beneficiary of record prior to receipt at any of their offices in Canada of a notice of a change of beneficiary.*
- *(e) A provision similar to section 196 (3) of the* Insurance Act *should be included in the URPBA.*
- *(f) The URPBA should expressly provide that the republication of a will by codicil is not effective to revive a revoked designation in a will unless the codicil expressly so provides. (Page 88)*

17. Upon the enactment of legislation based on the URPBA, sections 43, 46 and 46.1 of the Law and Equity Act *should be repealed. (Page 88)*

18. Parts 4 and 5 of the Insurance Act *be amended to provide that the republication of a will by codicil is not effective to revive a revoked designation in a will unless the codicil expressly so provides. (Page 88)*

19. A provision similar to section 142 of the Insurance Act *be enacted in Part 5 of the* Insurance Act, *and as part of the URPBA. (Page 91)*

20. The reference to intestacy in section 45 of the Wills Act *be deleted. (Page 101)*

21. The doctrine of renvoi *be abolished in respect of the formal and essential validity of wills by permitting reference to the internal law of a foreign jurisdiction only. "Internal law" should be defined to exclude the choice of law rules of the foreign jurisdiction. (Page 101)*

22. The choice of law rules should apply to wills made within British Columbia as well as to those made in other jurisdictions. (Page 102)

23. Where a law in force outside of British Columbia is to be applied, any requirement that:

- *(a) special formalities are to be observed by testators of a particular description; or*
- *(b) witnesses to a will are to have certain qualifications;*

should be treated as a formal requirement only. (Page 102)

24. A provision similar to section 6 (2) of the Wills Act, 1963 *be enacted in British Columbia. (Page 103)*

25. Section 42 of the Wills Act *should be repealed and replaced by provisions comparable to the following:*

42 (1) Insofar as the manner and formalities of making a will are concerned, a will is valid and admissible to probate if made in accordance with the internal law of:

- *(a) the jurisdiction where the will was made, or*
- *(b) the testator's domicile, either at the date the will was made or at the date of his death, or*
- *(c) the testator's habitual residence, either at the date the will was made or at the date of his death, or*
- *(d) a country of which the testator was a national, either at the date the will was made or at the date of his death, or*
- *(e) British Columbia.*

(2) A disposition of an interest in movables or immovables contained in a will which does not conform to a law whose choice is authorized by this Act is valid if it conforms to the law of the place where the property is situated, either at the date the will was made or at the date of death. (Page 107)

26. A provision comparable to section 6 (3) of the English Wills Act, 1963 *be enacted in British Columbia. (Page 108)*

27. A provision comparable to section 40 (2) (a) and (c) of the Uniform Wills Act *be enacted in British Columbia. (Page 108)*

28. The choice of law provisions in the Wills Act *should not make reference to the intrinsic (or essential) validity and effect of a will. (Page 110)*

29. References to an interest in "land" should be deleted from the choice of law provisions of the Wills Act *and replaced by references to an interest in "immovables." (Page 110)*

30. A provision comparable to section 40 (2) (b) of the Uniform Wills Act *be enacted in British Columbia. (Page 111)*

B. Acknowledgments

The Commission wishes to record its gratitude to a number of persons who have contributed to this Report. Our thanks go to Douglas Chalke, a former Legal Research Officer to the Commission, who was involved in the initial stages of preparation of the Working Paper which preceded this Report. We also wish to thank Mr. J.C. Scott-Harston, Q.C., who was retained as a consultant in connection with this study. His wealth of experience, both practical and academic, was of great assistance to us throughout the preparation of this Report. Finally, we should liked to express our appreciation to Mr. Fred Hansford, Assistant Counsel to the Commission, for his skill and care in drafting this Report and the Working Paper which preceded it.

We would also like to express our gratitude to our many correspondents who took the time to consider Working Paper No. 28, and whose helpful comments and suggestions helped us sharpen our appreciation of the effect of our proposals. Their assistance was invaluable.

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APPENDICIES

APPENDIX A

WILLS ACT, R.S.B.C. 1979

CHAPTER 434

Wills Notice

Interpretation

1. In this Act "will" includes a testament, a codicil, an appointment by will or by writing in the nature of a will in exercise of a power and any other testamentary disposition.

PART 1

Property disposable by will

2. A person may by will devise, bequeath or dispose of all property, whether acquired before or after making his will, to which at the time of his death he is entitled either at law or in equity, including

(a) estates pur autre vie, whether there is or is not a special occupant, and whether they are corporeal or incorporeal hereditaments;
(b) contingent, executory or other future interest in property, whether the testator is or is not ascertained as the person or one of the persons in whom those interests may respectively become vested and whether he is entitled to them under the instrument by which they were respectively created or under a disposition of them by deed or will;
(c) rights of entry.

Writing required

3. A will is valid only when it is in writing.

Signatures required on formal will execution

4. Subject to section 5, a will is not valid unless

(a) at its end it is signed by the testator or signed in his name by some other person in his presence and by his direction;
(b) the testator makes or acknowledges the signature in the presence of 2 or more attesting witnesses present at the same time; and
(c) 2 or more of the attesting witnesses subscribe the will in the presence of the testator.

Military forces and mariners

5. (1) A member of the Canadian Forces while placed on active service under the National Defence Act, or member of the naval, land or air force of any member of the British Commonwealth of Nations or any ally of Canada while on active service, or a mariner or seaman at sea or in the course of a voyage may, regardless of his age, dispose of his real and personal estate by will in writing, signed by the testator at its end or by some other person in the presence of and by the direction of the testator.

(2) Where the will is signed by the testator, there shall be no necessity for the presence, attestation or subscription of any witness.

(3) Where the will is signed by another person, the signature of that other person shall be attested by the signature of at least one person, who shall attest in the presence of the testator and of that other person.

Place of signature

6. (1) A will is deemed to be signed at its end if the signature of the testator, made either by him or the person signing for him, is placed at or after or following or under or beside or opposite to the end of the will so that it is apparent on the face of the will that the testator intended to give effect by the signature to the writing signed as his will.

(2) A will is not rendered invalid by the circumstance that

(a) the signature does not follow immediately the end of the will;
(b) a blank space intervenes between the concluding words of the will and the signature;
(c) the signature is placed among the words of a testimonium clause or of a clause of attestation or follows or is after or under a clause of attestation either with or

without a blank space intervening, or follows or is after or under or beside the name of a subscribing witness;

(d) the signature is on a side or page or other portion of the paper or papers containing the will on which no disposing part of the will is written above the signature; or

(e) there appears to be sufficient space to contain the signature on or at the bottom of the side or page or other portion of the same paper on which the will is written and preceding that on which the signature appears.

(3) The generality of subsection (1) is not restricted by the enumeration of circumstances set out in subsection (2), but a signature in conformity with section 4 or 5 or this section does not give effect to a disposition or direction that is underneath the signature or that follows the signature or to a disposition or direction inserted after the signature was made.

Infants

7. (1) A will made by a person who is under the age of 19 years is not valid unless at the time of making the will the person

(a) is or has been married; or

(b) is a person described in section 5.

(2) For the purposes of section 5 and of this section, a certificate purporting to be signed by or on behalf of an officer having custody of the records of the force in which a person was serving at the time the will was made setting out that the person was at that time a member of a naval, military or air force of a named country is sufficient proof of that fact.

(3) A person who has made a will to which subsection (1) applies may, while under the age of 19 years, revoke the will.

Will exercising power of appointment

8. A will made in accordance with this Act is as to form a valid execution of a power of appointment by will, notwithstanding that it has been expressly required that a will in exercise of the power be made in some form other than that in which it is made.

Publication

9. A will made in accordance with this Act is valid without other publication.

Incompetency of witness

10. Where a person who attested a will was at the time of its execution or afterward has become incompetent as a witness to prove its execution, the will is not on that account invalid.

Gift to attesting witness

11. (1) Where a will is attested by a person to whom or to whose then wife or husband a beneficial devise, bequest or other disposition or appointment of or affecting property, except charges and directions for payment of debt, is thereby given or made, the devise, bequest or other disposition or appointment is void so far only as it concerns the person so attesting, or the wife or the husband or a person claiming under any of them; but the person so attesting is a competent witness to prove the execution of the will or its validity or invalidity.

(2) A devise, bequest or other disposition or appointment is not void under this section where the will is attested in accordance with section 4 or 5 by at least the number of persons required by those sections and who are not persons within subsection (1).

Creditor as witness

12. Where property is charged by a will with a debt and a creditor or the wife or husband of a creditor whose debt is so charged attests a will, the person so attesting, notwithstanding that charge, is a competent witness to prove the execution of the will or its validity or invalidity.

Executor as witness

13. A person is not incompetent as a witness to prove the execution of a will, or its validity or invalidity, solely because he is an executor.

Revocation in general

14. (1) A will or part of a will is revoked only by

(a) marriage of the testator, subject to section 15;

(b) another will made in accordance with this Act;

(c) a writing declaring an intention to revoke and made in accordance with the provisions of this Act governing the making of a will; or

(d) the burning, tearing or destruction of it in some other manner by the testator, or by some person in his presence and by his direction, with the intention of revoking it.

(2) A will is not revoked by presumption of an intention to revoke it on the ground of a change in circumstances.

Revocation by marriage

15. A will is revoked by the marriage of the testator, except where

(a) there is a declaration in the will that it is made in contemplation of the marriage; or

(b) the will is made in exercise of a power of appointment of property which would not in default of the appointment pass to the heir, executor or administrator of the testator or to the persons entitled to the estate of the testator if he died intestate.

Revocation of gift on dissolution

16. (1) Where in a will a testator

(a) gives an interest in property to his spouse;

(b) appoints his spouse executor or trustee; or

(c) confers a general or special power of appointment on his spouse, and after the making of the will and before his death

(d) a judicial separation has been ordered in respect of his marriage;

(e) his marriage is terminated by a decree absolute of divorce; or

(f) his marriage is found to be void or declared a nullity by a court

then, unless a contrary intention appears in the will, the gift, appointment or power is revoked and the will takes effect as if the spouse had predeceased the testator.

(2) In subsection (1) "spouse" includes a person considered by the testator to be his spouse.

Making alteration

17. (1) Subject to subsection (2), unless an alteration that is made in a will is made in accordance with the provisions of this Act governing the making of a will, the alteration has no effect, except to invalidate words or meanings that it renders no longer apparent.

(2) An alteration that is made in a will is validly made when the signature of the testator and the subscription of the witness or witnesses to the signature of the testator to the alteration are made

(a) in the margin or in some other part of the will opposite or near to the alteration; or

(b) at the end of or opposite to a memorandum referring to the alteration and written in some part of the will.

Revival

18. (1) A will or part of a will that has been in any manner revoked is revived only

(a) by a will made in accordance with this Act; or

(b) by a codicil made in accordance with this Act that shows an intention to give effect to the will or part that was revoked.

(2) Except when a contrary intention is shown, when a will that has been partly revoked and afterward wholly revoked is revived, the revival does not extend to the part that was revoked before the revocation of the whole.

Subsequent conveyance

19. A conveyance of or other act relating to property comprised in a devise or bequest or other disposition, made or done after the making of a will, does not prevent operation of the will with respect to any estate or interest in the property that the testator had power to dispose of by will at the time of his death.

Effective time of will

20. (1) When a will has been revived or re-executed by a codicil, the will is deemed to have been made at the time at which it was revived or re-executed.

(2) Except when a contrary intention appears by the will, a will speaks and takes effect as if it had been made immediately before the death of the testator with respect to the property.

Lapsed and void devises and bequests

21. Except when a contrary intention appears by the will, property or an interest in it that is comprised or intended to be comprised in a devise or bequest that fails or becomes void by reason of the death of the devisee or donee in the lifetime of the testator, or by reason of the devise or bequest being contrary to law or otherwise incapable of taking effect, is included in the residuary devise or bequest, if any, contained in the will.

Inclusion of leaseholds in general devise

22. Except when a contrary intention appears by the will, where a testator devises
- (a) his land;
- (b) his land in a place mentioned in the will, or in the occupation of a person mentioned in the will;
- (c) land described in a general manner; or
- (d) land described in a manner that would include a leasehold estate if the testator had no freehold estate which could be described in the manner used,

the devise includes the leasehold estates of the testator or any of them to which the description extends, as well as freehold estates.

Exercise of general power of appointment by general gift

23. (1) Except when a contrary intention appears by the will, a general devise of
- (a) the real property of the testator;
- (b) the real property of the testator in a place mentioned in the will or in the occupation of a person mentioned in the will; or
- (c) real property described in a general manner

includes any real property or any real property to which the description extends, that he has power to appoint in any manner he thinks proper and operates as an execution of the power.

(2) Except when a contrary intention appears by the will, a bequest of
- (a) the personal property of the testator; or
- (b) personal property described in a general manner

includes any personal property or any personal property to which the description extends, that he has power to appoint in any manner he thinks proper and operates as an execution of the power.

Devise without words of limitation

24. Except when a contrary intention appears by the will, where real property is devised to a person without words of limitation, the devise passes the fee simple or the whole of any other estate that the testator had power to dispose of by will in the real property.

Gifts to heirs

25. Except when a contrary intention appears by the will, where property is devised or bequeathed to the heir or next of kin of the testator or of another person, the devise or bequest takes effect as if it had been made to the persons among whom and in the shares in which the estate of the testator or other person would have been divisible if he had died intestate.

Meaning of "die without issue"

26. (1) Subject to subsection (2), in a devise or bequest of property
- (a) the words
  - (i) "die without issue";
  - (ii) "die without leaving issue"; or
  - (iii) "have no issue"; or
- (b) other words importing either a want or failure of issue of a person in his lifetime or at the time of his death or an indefinite failure of his issue

shall be deemed to refer to a want or failure of issue in the lifetime or at the time of death of that person and not to an indefinite failure of his issue unless a contrary intention appears by the will.

(2) This section does not extend to cases where the words defined in subsection (1) import
- (a) if no issue described in a preceding gift be born; or
- (b) if there be no issue who live to attain the age or otherwise answer the description required for obtaining a vested estate by a preceding gift to that issue.

Devise to trustees otherwise than for term

27. Except when there is devised to a trustee expressly or by implication an estate for a definite term of years absolute or determinable or an estate of freehold, a devise of real property to a trustee or executor passes the fee simple or the whole of any other estate or interest that the testator had power to dispose of by will in the real property.

Unlimited devise to trustees

28. Where real property is devised to a trustee without express limitation of the estate to be taken by him and the beneficial interest in the real property or in the surplus rents and profits

(a) is not given to a person for life; or

(b) is given to a person for life but the purpose of the trust may continue beyond his life,

the devise vests in the trustee the fee simple or the whole of any other legal estate that the testator had power to dispose of by will in the real property and not an estate determinable when the purposes of the trust are satisfied.

Gifts to issue predeceasing testator

29. (1) Except when a contrary intention appears by the will, where a person dies in the lifetime of a testator either before or after the testator makes the will and that person

(a) is a child or other issue or a brother or sister of the testator to whom, either as an individual or as a member of a class, is devised or bequeathed an estate or interest in property not determinable at or before his death; and

(b) leaves issue any of whom is living at the time of the death of the testator,

the devise or bequest does not lapse, but takes effect as if it had been made directly to the persons among whom and in the shares in which the estate of that person would have been divisible if he had died intestate without leaving a spouse and without debts immediately after the death of the testator.

(2) Except when a contrary intention appears by the will, where a person dies in the lifetime of a testator either before or after the testator makes the will and that person

(a) is a child or other issue or a brother or sister of the testator to whom, either as an individual or as a member of a class, is devised or bequeathed an estate or interest in property not determinable at or before his death; and

(b) leaves a spouse but does not leave issue any of whom is living at the time of the death of the testator,

the devise or bequest does not lapse, but takes effect as if it had been made directly to the persons among whom and in the shares in which the estate of that person would have been divisible if he had died intestate and without debts immediately after the death of the testator.

Illegitimate children

30. In the construction of a will, except when a contrary intention appears by the will, an illegitimate child shall be treated as if he were the legitimate child of his mother.

Primary liability of mortgaged land

31. (1) Where a person dies possessed of, or entitled to, or under a general power of appointment by his will disposes of, an interest in freehold or leasehold property which, at the time of his death, is subject to a mortgage, and the deceased has not, by will, deed or other document, signified a contrary or other intention, the interest is, as between the different persons claiming through the deceased, primarily liable for the payment or satisfaction of the mortgage debt; and every part of the interest, according to its value, bears a proportionate part of the mortgage debt on the whole interest.

(2) A testator does not signify a contrary or other intention within subsection (1) by

(a) a general direction for the payment of debts or of all the debts of the testator out of his personal estate or his residuary real or personal estate, or his residuary real estate; or

(b) a charge of debts on that estate,

unless he further signifies that intention by words expressly or by necessary implication referring to all or some part of the mortgage debt.

(3) Nothing in this section affects a right of a person entitled to the mortgage debt to obtain payment or satisfaction either out of the other assets of the deceased or otherwise.

(4) In this section "mortgage" includes an equitable mortgage, and any charge, whether equitable, statutory or of other nature, including a lien or claim on freehold or leasehold property for unpaid purchase money, and "mortgage debt" has a meaning similarly extended.

Executor as trustee of residue

32. (1) Except where a contrary intention appears by the will, where a person dies after this Act takes effect, having by will appointed a person executor, the executor is a trustee of any residue not expressly disposed of for the persons among whom and in the shares in which the estate of the testator would have been divisible if he had died intestate.

(2) Nothing in this section affects or prejudices a right to which the executor, if this Part had not been passed, would have been entitled in cases where there is not a person who would be so entitled.

PART 2

Filing of notice of will with Director of Vital Statistics

33. Where a person has executed a will, a notice may be filed with the Director of Vital Statistics in the form prescribed by regulation.

Filing of notice of revocation

34. Where notice has been filed under section 33 and the will mentioned in it has been revoked, a notice of revocation in the form prescribed by regulation may be filed with the Director of Vital Statistics.

Change of place where will is situated

35. Where a will is no longer situated at the place mentioned in the notice, notice of the change in the form prescribed by regulation may be filed with the Director of Vital Statistics.

Index

36. The Director of Vital Statistics shall cause every notice filed with him under this Act to be numbered consecutively and to be filed in numerical order, and shall keep an index book showing in alphabetical order the name of each testator notice of whose will is filed under this Act, together with the number under which the notice is filed.

Search of index book

37. (1) A solicitor of the Supreme Court of British Columbia may, on written application in the form prescribed by regulation, ascertain from the Director of Vital Statistics whether or not a notice has been filed under this Act.

(2) Any person other than a solicitor of the Supreme Court of British Columbia may, on written application accompanied either by a certificate of the death of the person named in the application or by a statutory declaration proving to the satisfaction of the Director of Vital Statistics that the person named in the application has died, ascertain from the director if the person has filed a notice under this Act.

(3) The Director of Vital Statistics shall issue to an applicant under subsection (1) or (2) a certificate in duplicate showing the contents of all notices filed and relevant to the application and shall permit the applicant, or the agent of the applicant, to inspect the notices.

(4) Except as provided in this section, the Director of Vital Statistics shall not furnish to any person information regarding notices filed under this Act or information showing whether or not a notice has been filed.

Validity of will or revocation not affected

38. The failure to file or the filing of a notice under this Act shall not affect the validity of a will or of the revocation of a will.

Fee for search

39. The fee for the making of a search under section 37 is $1.

Regulations

40. The Lieutenant Governor in Council may make regulations regarding

(a) the keeping, custody, disposal, destruction and indexing of notices filed under this Part that have been superseded or that refer to wills that have been probated;

(b) the use to be made of and the procedure to be followed with respect to the original and duplicate certificate issued under section 37;

(c) the carrying into effect of this Part according to its true intent, or the supplying of deficiencies in it; and

(d) prescribing forms for use under this Act.

PART 3

Interpretation

41. (1) In this Part

(a) an interest in land includes a leasehold estate as well as a freehold estate in land, and any other estate or interest in land whether the estate or interest is real property or is personal property;

(b) an interest in movables includes an interest in a tangible or intangible thing other than land, and includes personal property other than an estate or interest in land.

(2) Subject to other provisions of this Part, the manner and formalities of making a will, and its intrinsic validity and effect, so far as it relates to an interest in land, are governed by the law of the place where the land is situated.

(3) Subject to other provisions of this Part, the manner and formalities of making a will, and its intrinsic validity and effect, so far as it relates to an interest in movables, are governed by the law of the place where the testator was domiciled at the time of his death.

Wills of interest in movables

42. In so far as the manner and formalities of making a will are concerned, a will, so far as it relates to an interest in movables, made without the Province is valid and admissible to probate if it is made in accordance with the law in force at the time of its making in the place where

(a) the will was made;
(b) the testator was domiciled when the will was made; or
(c) the testator had his domicil of origin.

Change of domicile

43. A change of domicile of the testator occurring after a will is made does not render it invalid as regards the manner and formalities of its making or alter its construction.

Construction of will

44. Nothing in this Part precludes resort to the law of the place where the testator was domiciled at the time of making a will in aid of its construction as regards an interest in land or an interest in movables.

Movables used in relation to land

45. Where the value of a thing that is movable consists mainly or entirely in its use in connection with a particular parcel of land by the owner or occupier of the land, succession to an interest in the thing, under a will or on an intestacy, is governed by the law of the place where the land is situated.

PART 4

Application

46. (1) Except as provided in subsection (2), this Act applies only to wills made after March 31, 1960.

(2) In the case of a person dying after March 17, 1960, sections 25 and 31 apply to the will and estate of the testator whether the will was made before or after March 31, 1960.

Form No. 398

Province of
British Columbia

Ministry of
Health
Division of Vital Statistics

1515 Blanshard Street
Victoria
British Columbia
V8W 3C8

WILLS NOTICE

Take notice that I, ...
(Print) (Given names in full.) (Surname.)

born on the .... day of ...., A.D. 19 ....

at ...., occupation ....
(City.) (Province or country.)

and now residing at ....
(Number.) (Street.) (City or place.) (Province or country.)

(a) HAVE (HAS) EXECUTED MY (HIS, HER) LAST WILL AND TESTAMENT bearing date the

.... day of ...., A.D. 19 .... which will is situate at

....
(Name of place, trust company, bank, law office, etc.)

at ....
(Street address.) (Name of city or place.) (Province.)

(b) HAVE (HAS) REVOKED MY (HIS, HER) LAST WILL AND TESTAMENT bearing date the

.... day of ...., A.D. 19 .... which will was situate at

....
(Name of place, trust company, bank, law office, etc.)

at ....
(Street address.) (Name of city or place.) (Province.)

(c) HAVE (HAS) CHANGED THE LOCATION OF MY (HIS, HER) LAST WILL AND TESTAMENT

bearing date the.................................... day of ...., A.D. 19 .... from

....
(Name of place, trust company, bank, law office, etc., where will *was formerly* situate)

to ....
(Name and address of place, trust company, bank, law office, etc., where will *is now* situate.)

Dated at..

....
Signature of testator (solicitor for testator).

this .... day of ...., A.D. 19 ....

Name and Address of Law Firm Submitting This Notice

APPENDIX B

Uniform Wills Act

(1962 Consolidation, page 378; Amended 1966 Proceedings, pages 23, 178; 1974 Proceedings pages 32, 171)

Interpretation

1. In this Act "will" includes

(a) a testament;

(b) a codicil;

(c) an appointment by will or by writing in the nature of a will in exercise of a power; and

(d) any other testamentary disposition.

PART I

General

Property disposable by will

2. A person may by will devise, bequeath or dispose of all real and personal property, (whether acquired before or after making his will), to which at the time of his death he is entitled either at law or in equity, including,

Estate *pur autre vie*

(a) estates *pur autre vie*, whether there is or is not a special occupant and whether they are corporeal or incorporeal hereditaments;

Contingent interests

(b) contingent, executory or other future interests in real or personal property, whether the testator is or is not ascertained as the person or one of the persons in whom those interests may respectively become vested, and whether he is entitled to them under the instrument by which they were respectively created or under a disposition of them by deed or will; and

Rights of entry

(c) rights of entry.

Writing required

3. A will is valid only when it is in writing.

Signatures required on formal will execution

4. Subject to sections 5 and 6, a will is not valid unless,

(a) at its end it is signed by the testator or signed in his name by some other person in his presence and by his direction;

(b) the testator makes or acknowledges the signature in the presence of two or more attesting witnesses present at the same time; and

(c) two or more of the attesting witnesses subscribe the will in the presence of the testator.

Military forces and mariners

5. (1) A member of the Canadian Forces while placed on active service pursuant to the *National Defence Act*, or a member of any other naval, land or air force while on active service, or a mariner or a seaman when at sea or in the course of a voyage, may make a will by a writing signed by him or by some other person in his presence and by his direction without any further formality or any requirement of the presence of or attestation or signature by a witness.

Certificate

(2) A certificate purporting to be signed by or on behalf of an officer having custody of the records of the force in which a person was serving at the time the will was made setting out that the person was on active service at that time is sufficient proof of that fact.

"active service" defined

(3) For the purposes of this section, if a certificate under subsection (2) is not available, a member of a naval, land or air force is deemed to be on active service after he has taken steps under the orders of a superior officer preparatory to serving with or being attached to or seconded to a component of such a force that has been placed on active service.

Holograph will

6. A testator may make a valid will wholly by his own handwriting and signature, without formality, and without the presence, attestation or signature of a witness.

Place of signature: all wills

7. (1) In so far as the position of the signature is concerned, a will is valid if the signature of the testator, made either by him or the person signing for him is placed at or after or following or under or beside or opposite to the end of the will so that it is apparent on the face of the will that the testator intended to give effect by the signature to the writing signed as his will.

Idem

(2) A will is not rendered invalid by the circumstance that

(a) the signature does not follow or is not immediately after the foot or end of the will;

(b) a blank space intervenes between the concluding words of the will and the signature;

(c) the signature

(i) is placed among the words of a testimonium clause or of a clause of attestation,

(ii) follows or is after or under a clause of attestation either with or without a blank space intervening, or

(iii) follows or is after or under or beside the name of a subscribing witness;

(d) the signature is on a side or page or other portion of the paper or papers containing the will on which no clause or paragraph or disposing part of the will is written above the signature; or

(e) there appears to be sufficient space on or at the bottom of the preceding side or page or other portion of the same paper on which the will is written to contain the signature.

Idem

(3) The generality of subsection (1) is not restricted by the enumeration of circumstances set out in subsection (2), but a signature in conformity with section 4, 5 or 6 or this section does not give effect to

(a) a disposition or direction that is underneath the signature or that follows the signature; or

(b) a disposition or direction inserted after the signature was made.

Infants

8. (1) A will made by a person who is under the age of majority is not valid unless at the time of making the will the person

(a) is or has been married;

(b) is a member of a component of the Canadian Forces,

(i) that is referred to in the *National Defence Act* as a regular force, or

(ii) while placed on active service under the *National Defence Act*; or

(c) is a mariner or seaman.

Certificate

(2) A certificate purporting to be signed by or on behalf of an officer having custody of the records of the force in which a person was serving at the time the will was made setting out that the person was at that time a member of a regular force or was on active service within subsection (1)(b) is sufficient proof of that fact.

Revocation of minor's will

(3) A person who has made a will under subsection (1) may, while under the age of majority, revoke the will.

Will exercising power of appointment

9. A will made in accordance with this Act is as to form a valid execution of a power of appointment by will notwithstanding that it has been expressly required that a will in exercise of the power be made in some form other than that in which it is made.

Publication

10. A will made in accordance with this Act is valid without other publication.

Incompetency of witness

11. Where a person who attested a will was at the time of its execution or afterward has become incompetent as a witness to prove its execution, the will is not on that account invalid.

Gifts to attesting witness void

12. (1) Where a will is attested by a person to whom or to whose then wife or husband a beneficial devise, bequest or other disposition or appointment of or affecting real or personal property, except charges and directions for payment of debt, is thereby given or made, the devise, bequest or other disposition or appointment is void so far only as it concerns

(a) the person so attesting; or

(b) the wife or the husband or a person claiming under any of them,

but the person so attesting is a competent witness to prove the execution of the will or its validity or invalidity.

Idem

(2) Where a will is attested by at least two persons who are not within subsection (1) or where no attestation is necessary, the devise, bequest or other disposition or appointment is not void under that subsection.

Creditor as witness

13. Where real or personal property is charged by a will with a debt and a creditor or the wife or husband of a creditor whose debt is so charged attests a will, the person so attesting, notwithstanding such charge, is a competent witness to prove the execution of the will or its validity or invalidity.

Executor as witness

14. A person is not incompetent as a witness to prove the execution of a will, or its validity or invalidity solely because he is an executor.

Revocation in general

15. A will or part of a will is revoked only by

(a) marriage, subject to section 16;

(b) another will made in accordance with this Act;

(c) a writing

(i) declaring an intention to revoke, and

(ii) made in accordance with the provisions of this Act governing making of a will; or

(d) burning, tearing or otherwise destroying it by the testator or by some person in his presence and by his direction with the intention of revoking it.

Revocation by marriage

16. A will is revoked by the marriage of the testator except where

(a) there is declaration in the will that it is made in contemplation of the marriage; or

(b) the will is made in exercise of a power of appointment of real or personal property which would not in default of the appointment pass to the heir, executor or administrator of the testator or to the persons entitled to the estate of the testator if he died intestate.

No revocation by presumption

17. (1) Subject to subsection 2, a will is not revoked by presumption of an intention to revoke it on the ground of a change in circumstances.

Effect of divorce

(2) Where in a will

(a) a devise or bequest of a beneficial interest in property is made to a spouse;

(b) a spouse is appointed executor or trustee; or

(c) a general or special power of appointment is conferred upon a spouse,

and after the making of the will and before the death of the testator, the marriage of the testator is terminated by a decree absolute of divorce or his marriage is found to be void or declared a nullity by a court in a proceeding to which he is a party, then, unless a contrary intention appears in the will, the devise, bequest, appointment or power is revoked and the will shall be construed as if the spouse had predeceased the testator.

Interpretation

(3) In subsection (2) "spouse" includes the person purported or thought by the testator to be his spouse. *(Revised 1978)*

Making alterations

18. (1) Subject to subsection (2), unless an alteration that is made in a will after the will has been made is made in accordance with the provisions of this Act governing making of a will, the alteration has no effect except to invalidate words or meanings that it renders no longer apparent.

Idem

(2) An alteration that is made in a will after the will has been made is validly made when the signature of the testator and subscription of witnesses to the signature of the testator to the alteration, or, in the case of a will that was made under section 5 or section 6, the signature of the testator, are or is made

(a) in the margin or in some other part of the will opposite or near to the alteration; or

(b) at the foot or end of or opposite to a memorandum referring to the alteration and written in some part of the will.

Revival

19. (1) A will or part of a will that has been in any manner revoked is revived only

(a) by a will made in accordance with this Act; or

(b) by a codicil that has been made in accordance with this Act,

that shows an intention to give effect to the will or part that was revoked.

Revival

(2) Except when a contrary intention is shown, when a will which has been partly revoked and afterward wholly revoked, is revived, the revival does not extend to the part that was revoked before the revocation of the whole.

Subsequent conveyance, etc.

20. (1) A conveyance of or other act relating to real or personal property comprised in a devise or bequest or other disposition, made or done after the making of a will, does not prevent operation of the will with respect to any estate or interest in the property that the testator had power to dispose of by will at the time of his death.

Rights in place of property devised

(2) Except when a contrary intention appears by the will, where a testator at the time of his death has a right or chose in action or equitable estate or interest that was created by a contract respecting, a conveyance of, or other act relating to real or personal property that was comprised in a devise or bequest, made or done after the making of a will, the devisee or donee of that real or personal property takes the right or chose in action or equitable estate or interest of the testator.

Commingling proceeds of sale

(3) Except when a contrary intention appears by the will, where the testator has bequeathed proceeds of the sale of property and the proceeds are received by him before his death, the bequest

is not adeemed by commingling the proceeds with the funds of the testator if the proceeds are traced into those funds.

Will revived or re-executed by codicil

21. (1) When a will has been revived or re-executed by a codicil, the will is deemed to have been made at the time at which it was revived or re-executed.

Will speaking from death

(2) Except when a contrary intention appears by the will, a will speaks and takes effect as if it had been made immediately before the death of the testator with respect to

(a) the real and personal property; and
(b) the right or chose in action or equitabe estate or interest or the proceeds under section 20(2) and (3).

Lapsed and void devises and bequests

22. Except when a contrary intention appears by the will, real or personal property or an interest therein that is comprised or intended to be comprised in a devise or bequest that fails or becomes void by reason of

(a) the death of the devisee or donnee in the life-time of the testator: or
(b) the devise or bequest being contrary to law or otherwise incapable of taking effect,

is included in the residuary devise or bequest, if any, contained in the will.

Inclusion of leaseholds in general devise

23. Except when a contrary intention appears by the will, where a testator devises

(a) his land;

(b) his land in a place mentioned in the will, or in the occupation of a person mentioned in the will;

(c) land described in a general manner; or

(d) land described in a manner that would include a leasehold estate if the testator had no freehold estate which could be described in the manner used,

the devise includes the leasehold estates of the testator or any of them to which the description extends, as well as freehold estates.

Exercise of general power of appointment by devise

24. (1) Except when a contrary intention appears by the will, a general devise of

(a) the real property of the testator;

(b) the real property of the testator

(i) in a place mentioned in the will, or

(ii) in the occupation of a person mentioned in the will; or

(c) real property described in a general manner,

includes any real property or any real property to which the description extends, that he has power to appoint in any manner he thinks proper and operates as an execution of the power.

Idem, personal property

(2) Except when a contrary intention appears by the will, a bequest of

(a) the personal property of the testator; or

(b) personal property described in a general manner,

includes any personal property or any personal property to which the description extends that he has power to appoint in any manner he thinks proper and operates as an execution of the power.

Devise without words of limitation

25. Except when a contrary intention appears by the will, where real property is devised to a person without words of limitation, the devise passes the fee simple or the whole of any other estate that the testator had power to dispose of by will in the real property.

Gifts to heirs

26. Except when a contrary intention appears by the will, where property is devised or bequeathed to the "heir" of the testator or of another person,

(a) the word "heir" means the person to whom the beneficial interest in the property would go under the law of the Province if the testator or the other person died intestate; and

(b) where used in that law the word "child" includes for the purpose of this section a person related by or through adoption to the testator or the other person.

Meaning of "die without issue"

27. (1) Subject to subsection (2), in a devise or bequest of real or personal property

(a) the words,

(i) "die without issue",

(ii) "die without leaving issue", or

(iii) "have no issue", or

(b) other words importing either a want or failure of issue of a person in his lifetime or at the time of his death or an indefinite failure of his issue, means a want or failure of issue in the lifetime or at the time of death of that person, and do not mean an indefinite failure of his issue unless a contrary intention appears by the will.

(2) This Act does not extend to cases where the words defined in subsection (1) import,

(a) if no issue described in a preceding gift be born; or

(b) if there be no issue who live to attain the age or otherwise answer the description required for obtaining a vested estate by a preceding gift to that issue.

Devise to trustees otherwise than for a term

28. Except when there is devised to a trustee expressly or by implication an estate for a definite term of years absolute or determinable or an estate of freehold, a devise of real property to a trustee or executor passes the fee simple or the whole of any other estate or interest that the testator had power to dispose of by will in the real property.

Unlimited devise to trustees

29. Where real property is devised to a trustee without express limitation of the estate to be taken by him and the beneficial interest in the real property or in the surplus rents and profits,

(a) is not given to a person for life; or

(b) is given to a person for life but the purpose of the trust may continue beyond his life,

the devise vests in the trustee the fee simple or the whole of any other legal estate that the testator had power to dispose of by will in the real property and not an estate determinable when the purposes of the trust are satisfied.

Charitable trusts

30. (1) Where a testator leaves property in trust or by outright gift for a charitable purpose that is linked conjunctively or disjunctively in the will with a non-charitable purpose, and the non-charitable purpose is void for uncertainty or for any other cause, the charitable trust or gift is valid and operates solely for the benefit of the charitable purpose.

Linked charitable trusts and non-charitable trusts

(2) Where a testator leaves property in trust or by outright gift for a charitable purpose that is linked conjunctively or disjunctively in the will with a non-charitable purpose and the non-charitable purpose is not void,

(a) the trust or gift is valid for both purposes; and

(b) where the will has not divided the property among the charitable and non-charitable purposes, the trustee or executor shall divide the property among the charitable and non-charitable purposes according to his discretion.

Devise of estate tail

31. Except when a contrary intention appears by the will, where a person to whom real property is devised for what would have been under the law of England an estate tail or in quasi entail

(a) dies

(i) in the lifetime of the testator,

(ii) at the same time as the testator, or

(iii) in circumstances rendering it uncertain whether that person or the testator survived the other; and

(b) leaves issue who would inherit under the entail if that estate existed,

if any such issue are living at the time of the death of the testator, the devise does not lapse but takes effect as if the death of that person had happened immediately after the death of the testator.

Gifts to issue predeceasing testator

32. Except when a contrary intention appears by the will, where a person dies in the life-time of a testator either before or after the testator makes the will and that person

(a) is a child or other issue or a brother or sister of the testator to whom, either as an individual or as a member of a class, is devised or bequeathed an estate or interest in real or personal property not determinable at or before his death; and

(b) leaves (a spouse or)* issue any of whom is living at the time of the death of the testator,

the devise or bequest does not lapse, but takes effect as if it had been made directly to the persons among whom and in the shares in which the estate of that person would have been divisible if he had died intestate and without debts immediately after the death of the testator, (except that the surviving spouse of that person is not entitled to receive a preferential share of dollars as provided under subsection(   ) of section   of the   Act).

* The words "a spouse or" in clause (b) should be considered carefully by any jurisdiction enacting the section as their inclusion would permit a surviving spouse of the beneficiary to benefit from the devise or bequest even though no issue survived the beneficiary. The words in brackets at the end of the section will not be necessary in those jurisdictions where a surviving spouse of an intestate leaving issue is not entitled to a preferential share. In those jurisdictions

where the surviving spouse of an intestate leaving issue is entitled to a preferential share of the intestate's estate, special attention should be given to make sure the wording in the brackets at the end of the section is suitable, having regard to the provisions relating to intestate's succession.

33. In the construction of testamentary dispositions, except when a contrary intention appears by the will, an illegitimate child shall be treated as if he were the legitimate child of his mother. Illegitimate children

34. (1) Where a person dies possessed of, or entitled to, or under a general power of appointment by his will disposes of, an interest in freehold or leasehold property which, at the time of his death, is subject to a mortgage, and the deceased has not, by will, deed or other document, signified a contrary or other intention, Primary liability of mortgaged land

(a) the interest is, as between the different persons claiming through the deceased, primarily liable for the payment or satisfaction of the mortgage debt; and

(b) every part of the interest, according to its value, bears a proportionate part of the mortgage debt on the whole interest.

(2) A testator does not signify a contrary or other intention within subsection (1) by, Idem

(a) a general direction for the payment of debts or of all the debts of the testator out of his personal estate or his residuary real or personal estate, or his residuary real estate; or

(b) a charge of debts upon that estate,

unless he further signifies that intention by words expressly or by necessary implication referring to all or some part of the mortgage debt.

(3) Nothing in this section affects a right of a person entitled to the mortgage debt to obtain payment or satisfaction either out of the other assets of the deceased or otherwise. Idem

(4) In this section, "mortgage" includes an equitable mortgage, and any charge whatsoever, whether equitable, statutory or of other nature, including a lien or claim upon freehold or leasehold property for unpaid purchase money and "mortgage debt" has a meaning similarly extended. "mortgage" defined

35. (1) Where a person dies after this Act takes effect, having by will appointed a person executor, the executor is a trustee of any Executors as trustee of residue

residue not expressly disposed of, for the person or persons, if any, who would be titled to that residue in the event of intestacy in respect to it, unless the person so appointed executor was intended by the will to take the residue beneficially.

Executor's rights not affected

(2) Nothing in this section affects or prejudices a right to which the executor, if this Part had not been passed, would have been entitled, in cases where there is not a person who would be so entitled.

Application of this Part

36. This Part applies only to wills made on or after the day of , 19 .

PART II

Conflict of Laws

Conflict of laws: interpretation

37. In this Part,

(a) an interest in land includes a leasehold estate as well as a freehold estate in land, and any other estate or interest in land whether the estate or interest is real property or is personal property;

(b) an interest in movables includes an interest in a tangible or intangible thing other than land, and includes personal property other than an estate or interest in land;

(c) "internal law" in relation to any place excludes the choice of law rules of that place.

Application of Part II

38. This Part applies to a will made either in or out of this Province.

Interest in land

39. (1) The manner and formalities of making a will, and its intrinsic validity and effect, so far as it relates to an interest in land, are governed by the internal law of the place where the land is situated.

Interest in movables

(2) Subject to other provisions of this Part, the manner and formalities of making a will, and its intrinsic validity and effect so far as it relates to an interest in movables, are governed by the internal law of the place where the testator was domiciled at the time of his death.

Interest in movables: formal validity

40. (1) As regards the manner and formalities of making a will of an interest in movables, a will is valid and admissible to probate if at the time of its making it complied with the internal law of the place where

(a) the will was made;

(b) the testator was then domiciled;

(c) the testator then had his habitual residence; or

(d) the testator then was a national if there was in that place one body of law governing the wills of nationals.

Idem

(2) Without prejudice to subsection (1), as regards the manner and formalities of making a will or an interest in movables, the following are properly made:

(a) a will made on board a vessel or aircraft of any description, if the making of the will conformed to the internal law in force in the place with which, having regard to its registration (if any) and other relevant circumstances, the vessel or aircraft may be taken to have been most closely connected;

(b) a will so far as it revokes a will which under this Part would be treated as properly made or revokes a provision which under this Part would be treated as comprised in a properly made will, if the making of the later will conformed to any law by reference to which the revoked will or provision would be treated as properly made;

(c) a will so far as it exercises a power of appointment, if the making of the will conforms to the law governing the essential validity of the power.

Change of domicile

41. A change of domicile of the testator occurring after a will is made does not render it invalid as regards the manner and formalities of its making or alter its construction.

Construction of will

42. Nothing in this Part precludes a resort to the law of the place where the testator was domiciled at the time of making a will in aid of its construction as regards an interest in land or an interest in movables.

Movables related to land

43. Where the value of a thing that is movable consists mainly or entirely in its use in connection with a particular parcel of land by the owner or occupier of the land, succession to an interest in the thing under a will is governed by the law that governs succession to the interest in the land.

Formalities

44. (1) Where, whether in pursuance of this Part or not, a law in force outside this Province is to be applied in relation to a will, any requirement of that law that

(a) special formalities are to be observed by testators answering a particular description; or

(b) witnesses to the making of a will are to possess certain qualifications,

shall be treated, notwithstanding any rule of that law to the contrary, as a formal requirement only.

Curative effect

(2) In determining for the purposes of this Part whether or not the making of a will conforms to a particular law, regard shall be had to the formal requirements of that law at the time the will was made, but this does not prevent account being taken of an ateration of law affecting wills made at that time if the alteration enables the will to be treated as properly made.

(NOTE: Each provincial legislature should expressly state (1) the date when this Act is to take effect and (2) the extent to which it is to apply to the wills of testators who die either before or after that date. An example of (2) is of section 7(4) of the Wills Act, 1963, (11-12 Elizabeth II, c. 44):

This Act does not apply to a will of a testator who died before the time of the commencement of this Act and applies to a will of a testator who dies after that time whether the will was executed before or after that time, but so that the repeal of the Wills Act 1861 shall not invalidate a will executed before that time.)

PART III

International Wills

Definitions

45. In this Part

(a) "convention" means the convention providing a uniform law on the form of international will, a copy of which is set out in the schedule to this Act;

(b) "effective date" means the day that is six months after the date on which the Government of Canada submits to the Government of the United States of America a declaration that the convention extends to the province; (*Updated editorially in 1979)*

(c) "international will" means a will that has been made in accordance with the rules regarding an international will set out in the Annex to the convention;

(d) "registration system" means a system for the registration, or the registration and safekeeping, of international wills established under section 52 or pursuant to an agreement entered into under section 53;

(e) "registrar" means the person responsible for the operation and management of the registration system.

Application of convention

46. On, from and after the effective date, the convention is in force in the province and applies to wills as law of the province.

Rules regarding international wills

47. On, from and after the effective date, the rules regarding an international will set out in the Annex to the convention are law in the province.

Validity of wills under other laws

48. Nothing in this Part detracts from or affects the validity of a will that is valid under the laws in force within the province other than this Part.

Authorized persons

49. All members of (*name of Law Society or Society of Notaries*) are designated as persons authorized to act in connection within international wills.

Request for declaration

50. The (*Provincial Secretary or other provincial minister*) shall request the Government of Canada to submit a declaration to the Government of the United States of America declaring that the convention extends to (*enacting province*). (*Amended editorially in 1979*).

Effective date determined

51. As soon as the effective date is determined, (*the Provincial Secretary or other provincial minister*) shall publish in the Gazette a notice indicating the date that is the effective date for the purposes of this Part.

Registration system

52. The Attorney General shall establish a system of registration or registration and safekeeping of international wills.

Agreements re registration system

53. With the approval of the Lieutenant Governor in Council, the Attorney General for and on behalf of Her Majesty in right of (*enacting province*) may enter into an agreement with the government of another province or a minister or official of the government of another province relating to the establishment of a system of registration or registration and safekeeping of international wills for (*enacting province*) and that other province, and for the joint operation of that system, or relating to the exchange of information contained in a system established under section 52 and a similar system established for that other province.

Joint system in lieu of provincial system

54. Where a registration system is established pursuant to an agreement entered into under section 53, the Attorney General is relieved of his obligation under section 52.

Disclosure of information in system

55. (1) Information contained in the registration system concerning the international will of a testator shall not be released from the system except in accordance with an agreement made under section 53 or except to a person who satisfies the registrar that

(a) he is the testator; or

(b) he is person who is authorized by the testator to obtain such information; or

(c) the testator is dead and the person is a proper person to have access to the information.

Release of will held for safekeeping

(2) Where the registration system provides for the safekeeping of international wills, an international will of a testator deposited in the system shall not be released except to a person who satisfies the registrar that

(a) he is the testator; or

(b) he is a person who is authorized by the testator to obtain the will; or

(c) the testatoris dead and the person is a proper person to have custody of the will for the purposes of the administration of the estate of the testator or the agent of such a person.

Use of registration system

56. (1) Where a member of (*name of Law Society or Society of Notaries*) has acted during any month in respect of one or more international wills in his capacity as a person authorized to act in connection with international wills, the member shall, on or before the 10th day of the next month, file or cause to be filed with the registrar, in a sealed envelope, a list on a form prescribed under the regulations, certified by him or his agent, setting out the name, address and description of the testator and the date of execution of each international will in respect of which he so acted, and the registrar shall enter the information in the registration system.

Failure to register not affecting validity

(2) The failure of a member of the (*name of Law Society or Society of Notaries*) to comply with subsection (1) in respect of an international will does not affect the validity of the international will.

Regulations

57. The Lieutenant Governor in Council may make regulations respecting the operation, maintenance and use of the registration system, and without limiting the generality of the foregoing, may make regulations.

(a) prescribing forms for use in the system; and

(b) prescribing fees for searches of the registration system.

(Note: Sections 52 to 57 may be brought into force on proclamation. Section 56 should not come into force until the registration system has been established.)

(Note: Consideration should be given in each jurisdiction enacting this Part as to changes that may be required to section 43 of the Uniform Wills Act or any equivalent provision fo the local Wills Act.)

PART IV

Supplementary

58. (1) Except as provided in subsection (2), this Act applies only to wills made after this Act comes into force; and for the purposes of this Act a will which is re-executed or revived by a codicil shall be deemed to be made at the time at which it is so re-executed or revived. Application of Act

(2) In the case of a person dying after this Act comes into force, section 32 applies to his will whether it was made before or after this Act comes into force. Idem, s. 32

59. (1) Except as provided in subsection (2), the (*cite here the existing* Wills Act) is repealed. Repeal

(2) The Act mentioned in subsection (1) continues in force, as if unrepealed, in respect of wills made before this Act comes into force. Exception

APPENDIX C

CONVENTION PROVIDING A UNIFORM LAW ON THE FORM OF AN INTERNATIONAL WILL

The States signatory to the present Convention,

DESIRING to provide to a greater extent for the respecting of last wills by establishing an additonal form of will hereinafter to be called an "international will" which, if employed, would dispense to some extent with the search for the applicable law;

HAVE RESOLVED to conclude a Convention for this purpose and have agreed upon the following provisions:

Article I

1. Each Contracting Party undertakes that not later than six months after the date of entry into force of this Convention in respect of that Party it shall introduce into its law the rules regarding an international will set out in the Annex to this Convention.

2. Each Contracting Party may introduce the provisions of the Annex into its law either by reproducing the actual text, or by translating it into its official language or languages.

3. Each Contracting Party may introduce into its law such further provisions as are necessary to give the provisions of the Annex full effect in its territory.

4. Each Contracting Party shall submit to the Depositary Government the text of the rules introduced into its national law in order to implement the provisions of this Convention.

Article II

1. Each Contracting Party shall implement the provisions of the Annex in its law, within the period provided for the preceding article, by designating the persons who, in its territory, shall be authorized to act in connection with international wills. It may also designate as a person authorized to act with regard to its nationals its diplomatic or consular agents abroad insofar as the local law does not prohibit it.

2. The Party shall notify such deisgnation, as well as any modifications thereof, to the Depositary Government.

Article III

The capacity of the authorized person to act in connection with an international will, if conferred in accordance with the law of a Contracting Party, shall be recognized in the territory of the other Contracting Parties.

Article IV

The effectiveness of the certificate provided for in Article 10 of the Annex shall be recognized in the territories of all Contracting Parties.

Article V

1. The conditions requisite to acting as a witness of an international will shall be governed by the law under which the authorized person was designated. The same rule shall apply as regards as interpreter who is called upon to act.

2. Nonetheless no one shall be disqualified to act as a witness of an international will solely because he is an alien.

Article VI

1. The signature of the testator, of the authorized person, and of the witnesses to an international will, whether on the will or on the certificate, shall be exempt from any legalization or like formality.

2. Nonetheless, the competent authorities of any Contracting Party may, if necessary, satisfy themselves as to the authenticity of the signature of the authorized person.

Article VII

The safekeeping of an international will shall be governed by the law under which the authorized person was designated.

Article VIII

No reservation shall be admitted to this Convention or to its Annex.

Article IX

1. The present Convention shall be open for signature at Washington from October 26, 1973, until December 31, 1974.

2. The Convention shall be subject to ratification.

3. Instruments of ratification shall be deposited with the Government of the United States of America, which shall be the Depositary Government.

Article X

1. The Convention shall be open indefinitely for accession.

2. Instruments of accession shall be deposited with the Depositary Government.

Article XI

1. The present Convention shall enter into force six months after the date of deposit of the fifth instrument of ratification or accession with the Depositary Government.

2. In the case of each State which ratifies this Convention or accedes to it after the fifth instrument of ratification or accession has been deposited, this Convention shall enter into force six months after the deposit of its own instrument of ratification or accession.

Article XII

1. Any Contracting Party may denouce this Convention by written notification to the Depositary Government.

2. Such denunciation shall take effect twelve months from the date on which the Depositary Government has received the notification, but such denunciation shall not affect the validity of any will made during the period that the Convention was in effect for the denouncing State.

Article XIII

1. Any State may, when it deposits its instrument of ratification or accession or at any time thereafter, declare, by a notice addressed to the Depositary Government, that this Convention shall apply to all or part of the territories for the international relations of which it is responsible.

2. Such declaration shall have effect six months after the date on which the Depositary Government shall have received notice thereof or, if at the end of such period the Convention has not yet come into force, from the date of its entry into force.

3. Each Contracting Party which has made a declaration in accordance with paragraph 1 of this Article may, in accordance with Article XII, denounce this Convention in relation to all or part of the territories concerned.

Article XIV

1. If a State has two or more territorial units in which different systems of law apply in relation to matters respecting the form of wills, it may at the time of signature, ratification, or accession, declare that this Convention shall extend to all its territorial units or only to one or more of them, and may modify its declaration by submitting another declaration at any time.

2. These declarations shall be notified to the Depositary Government and shall state expressly the territorial units to which the Convention applies.

Article XV

If a Contracting Party has two or more territorial units in which different systems of law apply in relation to matters respecting the form of wills, any reference to the internal law of the place where the will is made or to the law under which the authorized person has been appointed to act in connection with international wills shall be construed in accordance with the constitutional system of the Party concerned.

Article XVI

1. The original of the present Convention, in the English, French, Russian and Spanish languages, each version being equally authentic, shall be deposited with the Government of the Unites States of America, which shall transmit certified copies thereof to each of the signatory and acceding States and to the International Institute for the Unification of Private Law.

2. The Depositary Government shall give notice to the signatory and acceding States, and to the International Institute for the Unification of Private Law, of:

(a) any signature;
(b) the deposit of any instrument of ratification or accession;
(c) any date on which this Convention enters into force in accordance with Article XI;
(d) any communication received in accordance with Article I, paragraph 4;

(e) any notice received in accordance with Article II, paragraph 2;
(f) any declaration received in accordance with Article XIII, paragraph 2, and the date on which such delcaration takes effect;
(g) any denunciation received in accordance with Article XII, paragraph 1, or Article XIII, paragraph 3, and the date on which the denunciation takes effect;
(h) any declaration received in accordance with Article XIV, paragraph 2, and the date on which the declaration takes effect.

IN WITNESS WHEREOF, the undersigned Plenipotentiaries, being duly authorized to that effect, have signed the present Convention.

DONE at Washington this twenty-sixth day of October, one thousand nine hundred and seventy-three.

APPENDIX D

ANNEX

UNIFORM LAW ON THE FORM OF AN INTERNATIONAL WILL

Article 1

1. A will shall be valid as regards form, irrespective particularly of the place where it is made, of the location of the assets and of the nationality, domicile or residence of the testator, if it is made in the form of an international will complying with the provisions set out in Articles 2 to 5 hereinafter.

2. The invalidity of the will as an international will shall not affect its formal validity as a will of another kind.

Article 2

This law shall not apply to the form of testamentary dispositions made by two or more persons in one instrument.

Article 3

1. The will shall be made in writing.
2. It need not be written by the testator himself.
3. It may be written in any language, by hand or by any other means.

Article 4

1. The testator shall declare in the presence of two witnesses and of a person authorized to act in connection with international wills that the document is his will and that he knows the contents thereof.

2. The testator need not inform the witnesses, or the authorized person, of the contents of the will.

Article 5

1. In the presence of the witnesses and of the authorized person, the testator shall sign the will or, if he has previously signed it, shall acknowledge his signature.

2. When the testator is unable to sign, he shall indicate the reason therefor to the authorized person who shall make note of this on the will. Moreover, the testator may be authorized by the law under which the authorized person was designated to direct another person to sign on his behalf.

3. The witnesses and the authorized person shall there and then attest the will by signing in the presence of the testator.

Article 6

1. The signature shall be placed at the end of the will.

2. If the will consists of several sheets, each sheet shall be signed by the testator or, if he is unable to sign, by the person signing on his behalf or, if there is no such person, by the authorized person. In addition, each sheet shall be numbered.

Article 7

1. The date of the will shall be the date of its signature by the authorized person.
2. This date shall be noted at the end of the will by the authorized person.

Article 8

In the absence of any mandatory rule pertaining to the safekeeping of the will, the authorized person shall ask the testator whether he wishes to make a declaration concerning the safekeeping of his will. If so and at the express request of the testator the place where he intends to have his will kept shall be mentioned in the certificate provided for in Article 9.

Article 9

The authorized person shall attach to the will a certificate in the form prescribed in Article 10 establishing that the obligations of this law have been complied with.

Article 10

The certificate drawn up by the authorized person shall be in the following form or in a substantially similar form:

CERTIFICATE

(Convention of October 26, 1973)

1. I, ... (name, address and capacity), a person authorized to act in connection with international wills
2. Certify that on .... (date) at .... (place)
3. (testator) .... (name, address, date and place of birth) in my presence and that of the witnesses
4. (a) .... (name, address, date and place of birth)
   (b) .... (name, address, date and place of birth)
   has declared that the attached document is his will and that he knows the contents thereof.
5. I furthermore certify that:
6. (a) in my presence and in that of the witnesses
   - (1) the testator has signed the will or has acknowledged his signature previously affixed.
   - *(2) following a declaration of the testator stating that he was unable to sign his will for the following reason ....
     - —I have mentioned this declaration on the will
     - *—the signature has been affixed by .... (name, address)
7. (b) the witnesses and I have signed the will;
8. (c) each page of the will has been signed by .... and numbered;
9. (d) I have satisfied myself as to the identity of the testator and of the witnesses as designated above;
10. (e) the witnesses met the conditions requisite to act as such according to the law under which I am acting;
11. *(f) the testator has requested me to include the following statement concerning the safekeeping of his will:
    ....
    ....
12. PLACE
13. DATE
14. SIGNATURE and, if necessary, SEAL

*To be completed if appropriate.

Article 11

The authorized person shall keep a copy of the certificate and deliver another to the testator.

Article 12

In the absence of evidence to the contrary, the certificate of the authorized person shall be conclusive of the formal validity of the instrument as a will under this Law.

Article 13

The absence or irregularity of a certificate shall not affect the formal validity of a will under this Law.

Article 14

The international will shall be subject to the ordinary rules of revocation of wills.

Article 15

In interpreting and applying the provisions of this law, regard shall be had to its international origin and to the need for uniformity in its interpretation.

Uniform Retirement Plan Beneficiaries Act

(*1975 Proceedings, pages 30, 178*)

Interpretation

1. In this Act

(a) "participant" means a person who is entitled to designate another person to receive a benefit payable under a plan on the participant's death;

(b) "plan" means

  (i) a pension, retirement, welfare or profit-sharing fund, trust, scheme, contract, or arrangement for the benefit of employees, former employees, agents, or former agents of an employer or their dependents or beneficiaries, or

  (ii) a fund, trust, scheme, contract, or arrangement for the payment of an annuity for life or for a fixed or variable term created before or after the commencement of this Act;

(c) "will" has the same meaning as in the *Wills Act*.

Designation of beneficiaries

2. A participant may designate a person to receive a benefit payable under a plan on the participant's death

(a) by an instrument signed by him or signed on his behalf by another person in his presence and by his direction; or

(b) by will,

and may revoke the designation by either of those methods.

Designation by will

3. A designation in a will is effective only if it relates expressly to a plan, either generally or specifically.

Revocation by will

4. A revocation in a will is effective to revoke a designation made by instrument only if the revocation relates expressly to the designation, either generally or specifically.

Latest designation prevails

5. Notwithstanding the *Wills Act*, a later designation revokes an earlier designation, to the extent of any inconsistency.

Revocation of will

6. Revocation of a will is effective to revoke a designation in the will.

Designations and revocations

7. A designation or revocation contained in an instrument purporting to be a will is not invalid by reason only of the fact that the instrument is invalid as a will.

Revocation

8. A designation in an instrument that purports to be but is not a valid will is revoked by an event that would have the effect of revoking the instrument if it had been a valid will.

Idem

9. Revocation of a designation does not revive an earlier designation.

Effective date

10. Notwithstanding the *Wills Act*, a designation or revocation in a will is effective from the time when the will is signed.

Payment

11. After the death of a participant who has made a designation that is in effect at the time of his death, the person designated may enforce payment of the benefit payable to him under the plan, but the person against whom the payment is sought to be enforced may set up any defence that he could have set up against the participant or his personal representative.

Where Act and plan inconsistent

12. Where this Act is inconsistent with a plan, this Act applies, unless the inconsistency relates to a designation made or proposed to be made after the making of a benefit payment where the benefit payment would have been different if the designation had been made before the benefit payment, in which case the plan applies.

Where Act does not apply

13. This Act does not apply to a contract or to a designation of a beneficiary to which the *Insurance Act* applies.

APPENDIX F

THE WILLS ACT, 1963 (U.K.), IN PART

An act to repeal the Wills Act 1861 and make new provision in lieu thereof; and to provide that certain testamentary instruments shall be probative for the purpose of the conveyance of heritable property in Scotland. [31st July 1963]

Whereas a Convention on the conflicts of laws relating to the form of testamentary dispositions was concluded on 5th October 1961 at the ninth session of the Hague Conference on Private International Law and was signed on behalf of the United Kingdom on February 1962:

And whereas, with a view to the ratification by Her Majesty of that Convention and for other purposes, it is expedient to amend the law relating to wills:

Be it therefore enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled and by the authority of the same, as follows:—

1. A will shall be treated as properly executed if its execution conformed to the internal law in force in the territory where it was executed or in the territory where, at the time of its execution or of the testator's death, he was domiciled or had his habitual residence, or in a state of which, at either of those times, he was a national.

2. (1) Without prejudice to the preceding section, the following shall be treated as properly executed—

(a) a will executed on board a vessel or aircraft of any description, if the execution of the will conformed to the internal law in force in the territory with which, having regard to its registration (if any) and other relevant circumstances, the vessel or aircraft may be taken to have been most closely connected;

(b) a will so far as it disposes of immovable property, if its execution conformed to the internal law in force in the territory where the property was situated;

* * *

6. (1) In this Act—

"internal law" in relation to any territory or state means the law which would apply in a case where no question of the law in force in any other territory or state arose;

"state" means a territory or group of territories having its own law of nationality;

(2) Where under this Act the internal law in force in any territory or state is to be applied in the case of a will, but there are in force in that territory or state two or more systems of internal law relating to the formal validity of wills, the system to be applied shall be ascertained as follows—

(a) if there is in force throughout the territory or state a rule indicating which of those systems can properly be applied in the case in question, that rule shall be followed, or

(b) if there is no such rule, the system shall be that with which the testator was most closely connected at the relevant time, and for this purpose the relevant time is the time of the testator's death where the matter is to be determined by reference to circumstances prevailing at his death, and the time of execution of the will in any other case.

(3) In determining for the purposes of this Act whether or not the execution of a will conformed to a particular law, regard shall be had to the formal requirements of that law at the time of execution, but this shall not prevent account being taken of an alteration of law affecting wills executed at that time if the alteration enables the will to be treated as properly executed.

APPENDIX G

European Treaty Series
No. 77

Série des Traités européens
N° 77

CONVENTION
ON THE ESTABLISHENT OF
A SCHEME OF REGISTRATION OF WILLS

CONVENTION
RELATIVE A L'ÉTABLISSEMENT
D'UN SYSTÈME D'INSCRIPTION DES TESTAMENTS

The member States of the Council of Europe, signatory hereto,

Considering that the aim of the Council of Europe is to achieve a greater unity between its Members;

Wishing to provide for a registration scheme enabling a testator to register his will in order to reduce the risk of the will remaining unknown or being found belatedly, and to facilitate the discovery of the existence of this will after the death of the testator;

Convinced that such a system would facilitate in particular the finding of wills made abroad,

Have agreed as follows:

Article 1

The Contracting States undertake to establish, in accordance with the provisions of this Convention, a scheme of registration of wills, with a view to facilitating, after the death of the testator, the discovery of the existence of the will.

Article 2

In order to implement the provisions of this Convention, each Contracting State shall establish or appoint one or more bodies responsible for the registration provided for by the Convention and for answering requests for information made in accordance with Article 8, paragraph 2.

Article 3

1. With a view to facilitating international co-operation, each Contracting State shall appoint a national body which shall, without any intermediary:
   (a) arrange for registration in other Contracting States as provided for in Article 6;
   (b) receive requests for information arriving from the national bodies of other Contracting States, and answer them under the conditions set out in Article 8.

2. Each Contracting State shall communicate to the Secretary General of the Council of Europe the name and address of the national body appointed in accordance with the preceding paragraph.

Article 4

1. The following shall be registered in a Contracting State:
   (a) Formal wills declared to a notary, a public authority or any person authorised by the law of that State to record them, as well as other wills deposited with an authority or a person authorised by law to accept such deposit, with a formal act of deposit having been established;
   (b) Holographic wills which have been deposited with a notary, a public authority or any person authorised by the law of that State to accept them, without a formal act of deposit having been established, subject to that law permitting such deposit. The testator may oppose registration if the said law does not prohibit such opposition.

2. Withdrawals, revocations and other modifications of the wills registered according to this Article shall also be registered if they are established in a form which would make registration compulsory according to the preceding paragraph.

3. Any Contracting State may exclude from the application of the present Article wills deposited with authorities of the armed forces.

Article 5

1. Registration shall be made at the request of the notary, the public authority or the person referred to in Article 4, paragraph 1.

2. Any Contracting State may, however, in special cases determined and under the

conditions specified by its national law, provide for the request for registration to be made by the testator.

Article 6

1. Registration shall not be subject to conditions of nationality of residence of the testator.

2. At the request of the testator, the notary, public authority or person referred to in Article 4, may request registration not only in the State where the will is made or deposited, but also, through the intermediary of the national bodies, in other Contracting States.

Article 7

1. The request for registration shall contain the following information at least:
   - (a) Family name and first name(s) of testator or author of deed (and maiden name, where applicable);
   - (b) Date and place (or, if this is not known, country) of birth:
   - (c) Address or domicile, as declared;
   - (d) Nature and date of deed of which registration is requested;
   - (e) Name and address of the notary, public athority or person who received the deed or with whom it is deposited.

2. This information must be contained in the register, in the form stipulated by each Contracting State.

3. The duration of registration may be determined by each Contracting State.

Article 8

1. Registration shall be secret during the lifetime of the testator.

2. On the death of the testator any person may obtain the information mentioned in article 7 on presentation of an extract of the death certificate or of any other satisfactory proof of death.

3. If the will has been made jointly by two or more persons, the provisions of paragraph 2 of this Article shall apply, notwithstanding the provisions of paragraph 1, on the death of any of the testators.

Article 9

Services between Contracting States pursuant to this Convention shall be rendered free of charge.

Article 10

This Convention shall not affect provisions which, in each Contracting State, relate to the validity of wills and other deeds referred to in this Convention.

Article 11

Each Contracting State shall have the option to extend, under the conditions to be established by that State, the registration system provided for by this Convention to any other will not referred to in Article 4 or any other deed affecting the devolution of an estate. In this case, in particular the provisions of Article 6, paragraph 2, shall apply.

Article 12

1. This Convention shall be open to signature by the member States of the Council of Europe. It shall be subject to ratification or acceptance. Instruments of ratification or acceptance shall be deposited with the Secretary General of the Council of Europe.

2. This Convention shall enter into force three months after the date of deposit of the third instrument of ratification or acceptance.

3. In respect of a signatory State ratifying or accepting subsequently, the Convention shall come into force three months after the date of the deposit of its instrument of ratification or accceptance.

Article 13

1. After the entry into force of this Convention, the Committee of Ministers of the Council of Europe may invite any non-member State to accede thereto.

2. Such accession shall be effected by depositing with the Secretary General of the Council of Europe an instrument of accession which shall take effect three months after the date of its deposit.

Article 14

1. Any Contracting State may, at the time of signature or when depositing its instrument of ratification, acceptance or accession, specify the territory or territories to which this Convention shall apply.

2. Any Contracting State may, when depositing its instrument of ratification, acceptance or accession or at any later date, by declaration addressed to the Secretary General of the Council of Europe, extend this Convention to any other territory or territories specified in the declaration and for whose international relations it is responsible or on whose behalf it is authorised to give undertakings.

3. Any declaration made in pursuance of the preceding paragraph may, in respect of any territory mentioned in such declaration, be withdrawn according to the procedure laid down in Aricle 16 of this Convention.

Article 15

No reservation shall be made to the provisions of this Convention.

Article 16

1. This Convention shall remain in force indefinitely.

2. Any Contracting State may, in so far as it is concerned, denounce this Convention by means of a notification addressed to the Secretary General of the Council of Europe.

3. Such denunciation shall take effect six months after the date of receipt by the Secretary General of such notification.

Article 17

The Secretary General of the Council of Europe shall notify the member States of the Council and any State which has acceded to this Convention of:

(a) any signature;
(b) any deposit of an instrument of ratification, acceptance or accession;
(c) any date of entry into force of this Convention in accordance with Article 12 thereof;
(d) any communication received in pursuance of the provisions of paragraph 2 of Article 3 and of paragraphs 2 and 3 of Article 14:
(e) any notification received in pursuance of the provisions of Article 16 and the date on which denunciation takes effect.

APPENDIX H

Privileged Wills

1. History of the Exception

The exemption from the requirements as to the formalities of execution for military personnel and mariners was founded on Roman law and initially introduced into English law by the *Statute of Frauds, 1677*:[1]

> Provided always, that notwithstanding this Act, any soldier being in actual military service, or any mariner or seaman being at sea, may dispose of his moveables, wages, and personal estate, as he or they might have done before the making of this Act.

During the first 172 years of its existence there were no reported cases on the provision. Then in 1843, in *Drummond* v. *Parrish*,[2] Sir Herbert Fust examined in detail not only the section but its civil law roots. The court concluded that the right to make a privileged will was restricted to soldiers *in expeditione*.[3] As the first reported judicial examination of the concept it was frequently relied on over the next century. In particular the courts tended to interpret the provision to accord with the civil law.

The privilege was continued in the *Wills Act, 1837* which provided that a will made by any person under the age of 21 years would be invalid, but a soldier in actual military service (or a mariner or seaman at sea) could dispose of his personal estate "as he might have before the Act."[4] Unfortunately no express reference was made to the position of soldiers and sailors under 21. In the English case of *In the Goods of Farquhar*[5] a minor mortally wounded on the battlefield wrote his will out in pencil. It was attested by only one witness, but was nevertheless admitted to probate. This case subsequently served as the precedent for a theory that the section permitted probate of wills made by infants. For example, *In the Goods of Hisock*[6] the will of an infant soldier killed in the Boer War was admitted to probate under the exception for privileged wills.[7]

The lack of any specific reference in the *Wills Act, 1837* to infant soldiers led to doubt being expressed whether the privilege extended to infants.[8] This doubt was dispelled by a 1918 amendment to a bill concerning Soldiers' and Sailors' Wills. A specific power was included in that bill expressly permitting infant soldiers to make a privileged will.[9]

In other common law jurisdictions outside of England the law respecting this privilege has developed in a less orderly fashion. In Australia the Queensland Law Reform Commission recently commented:[10]

> Quite apart from the lack of articulation which characterizes the existing piecemeal legislation is the whole question of to whom privilege as to form and age should be extended . . . Unfortunately, we find the existing provisions in the different Australian States divergent to a point of bewilderment, and although we would like to adopt a provision from another State in the interests of uniformity in this particular area of the law, where the State connection as such should be minimized, we find that we cannot recommend the acceptance of any of the provisions which have been adopted by other States.

In the United States the provisions for privileged wills vary from state to state. Under the Uniform Probate Code privilege is abolished.

In Canada there is also a lack of uniformity in the Statutes creating the privilege. The *Wills Acts* of most provinces contain exceptions to the general rule for military personnel but the specific wording, and even the method of implementing this exception, varies from province to province.[11]

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[1] The *Statute of Frauds, 1677*, 29 Car II, c. 3, s. 23. Sir Herbert Jenner Fust commented in *Drummond* v. *Parrish*, *infra* n. 2:

> Now the words used in both Acts of Parliament are as nearly as possible the same as those used by Swinburne in explaining the word 'expedition'; the probability is that the words of the 23rd section of the Statute of Frauds, from which the 11th section of the present act was taken, were borrowed from Swinburne.

[2] (1843) 3 Curt 522; 163 E.R. 812.

[3] *Ibid.* at 818, (E.R.).

[4] *Wills Act, 1837*, 1 Vic. c. 26, ss. 7 and 11. [The age has now been reduced to 18 by the *Family Law Reform Act, 1969*, c. 46, s. 3 (1) (a) (U.K.)].

[5] *In the Goods of Farquhar* (1846) 4 Notes of Cases 651; 39 The English and Empire Dig. (1st ed., 1928) 335.

[6] *In the Goods of Hisock* [1901] p. 78; *and see* note on this case at (1901) 17 L.Q. Rev. 125.

[7] Theobald on Wills, (13th ed. 1971) 182. Thus a privileged individual could dispose of personal property if male over fourteen years of age or if female over twelve years of age.

[8] *In Re Wernher*, [1918] 1 Ch. D. 339 at 360, *per* Younger J. and [1918] 2 Ch. D 82 (C.A.).

[9] Judgment was given by Younger J. on Jan. 15, 1918 and Royal Assent given on Feb. 6, 1918 to *The Wills (Soldiers and Sailors) Act, 1918*. *See also* note on this case at (1918) 34 L.Q.Rev. 226.

[10] Queensland Law Reform Commission, Working Paper on a *Bill to Consolidate and Amend the Law of Succession and the Administration of Estates*, (1975) p. 10.

In British Columbia the present statutory provision is the result of a number of amendments to the *Wills Act*.[12] The original provision of the *Wills Act, 1837* was received into British Columbia law. It was amended in 1918 to permit real property to pass under a privileged will if the soldier was 21 years old or older and died within a year of the end of World War I. During the Second World War the *Wills Act* was again amended to permit infant military personnel to make a privileged will, but not infant mariners and seamen.[13] This anomaly appears to be the result of the British Columbia case of *Re Bird*.[14] In that case the Supreme Court per Robertson J. indicated that a soldier under 21 years of age could not make a will, even if he was on active military service. Finally, in 1960 the present provisions, adapted from the *Uniform Wills Act*, were enacted.

2. Privileged Military Personnel

The *Wills Act* provides that in order to fall within the privilege a military testator must be either a member of the Canadian Forces and on active service pursuant to the *National Defence Act*, or else a member of the forces of certain other countries on active service. There are three separate components to this provision:

(a) active service;
(b) membership in the Canadian Forces; or
(c) membership in certain foreign forces.

(a) Active service

Several interpretations have been given to the words active service[15] used in the *Wills Act*. Defining the term active service is complicated by a number of factors. Firstly, the words active service have their origin in English military discipline statutes.[16] Secondly, although the English *Wills Act, 1837* and some Canadian provincial statutes use the phrase "actual military service" the courts have held that these words are equivalent to "active service." Thirdly, doubt exists as to when a person is said to be "in service", and as to when that service may be said to be "active".[17]

In Canada, the term "actual service" (or "actual military service") has not often been considered. In the Saskatchewan case of *Re McLennan Estate*, a testator made his will on a military form and subsequently died in barracks at Saskatoon six weeks later.[18] The court held that the deceased was in "actual military service" and relied on a Saskatchewan statute deeming a person to be in "actual military service" when some steps had been taken under orders in preparation of joining forces engaged in hostilities.[19]

The *Wills Act* of British Columbia refers to "a member of the Canadian Forces while placed on active service pursuant to the *National Defence Act*," and to a member of the naval, land, or air force of any member of the British Commonwealth of Nations or any ally of Canada while "on active service." A distinction is thus drawn between "active service" and "while placed on active service pursuant to the *National Defence Act*."[20] "Active service pursuant to the *National Defence Act" prima facie* means that the testator was serving with a unit which had been placed on active service by order in council. The *National Defence Act* itself provides that a person on active service under the Act is on active service "for all purposes."[21]

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[11] *See The Wills Act*, R.S.A. 1970, c. 393, s. 9 (1); *Wills, Executors and Trustees Act*, R.S.S. 1965, c. 127, s. 6 (3); *The Wills Act*, R.S.M. 1970, c. W150, s. 9; *Wills Ordinance*, R.O.Y.T. 1971, c. W-3, s. 5 (2); *Wills Ordinance*, R.O.N.T. 1974, c. W-3, s. 5(1); *The Succession Law Reform Act, 1977*, S.O. 1977, c. 40, s. 8 (1); *Wills Act*, R.S.N.B. 1973, c. W-9, s. 8 (1); *Wills Act*, R.S.N.S. 1967, c. 340, s. 8 (1), 8 (3); *Wills Act*, R.S.N. 1970, c. 401, s. 2 and *Wills (Volunteers) Act*, R.S.N. 1970, c. 402, s. 3; *Probate Act*, R.S.P.E.I. 1974, c. P-19, s. 63 (2) and 63 (3); *Wills Act*, R.S.B.C. 1979, c. 434, s. 5; Article 849 of the Civil Code of Quebec provides:

> Wills made in Lower Canada or else whereby military men on active service out of garrison, or by mariners during voyages, on board ship or in hospital, which would be valid in England as regards their form, are likewise valid in Lower Canada.

The Civil Code Revision Office of the Province of Quebec proposes that the exceptions be deleted.

[12] R.S.B.C. 1897, c. 193, s. 9 and R.S.B.C. 1911, c. 291, s. 9, adopting identical wording to *The Wills Act, 1837*, 7 Will. IV & 1 Vict. c. 26, s. 11, amended by the *Wills Act Amendment Act, 1918*, S.B.C. 1918, c. 101, s. 2 and continued through R.S.B.C. 1924, c. 274, s. 9 (2) and R.S.B.C. 1936, c. 308, s. 9 (2).

In 1960, the Uniform Wills Act provision was introduced and is in fact the present form (s. 8).

[13] The *Wills Act Amendment Act, 1941-42*, S.B.C. 1941-42, c. 52.

[14] *Re Bird*, [1940] 1 W.W.R. 63 (B.C.S.C.). Although Robertson J. did not elaborate on his reasons for denying the validity of the will, the editor of the Reports included the following note:

> Presumably the Judge took the same position that Younger L.J. took in England in 1918 in *In Re Wernher*, 87 L.J. Ch. 255, affirmed *ibid*, 372, [1918] 2 Ch. 82, which led to an Act there in that year. That position was that sec 7 of the *Wills Act, 1837*, governs and the proviso in sec. 11 is only a proviso as to the form and not a proviso as to the right to make a will. A number of English and Australian cases of probates of infant soldiers' wills were cited.—Ed.

[15] *See generally* Cole, G., *What is "Actual Military Service?"* (1973) 123 New L.J. and cases reviewed in *Re Wingham*, [1948] 2 All E.R. 908. *See also* Megarry R.E., *Actual Military Service and Soldiers' Privileged Wills*, (1941) 57 L.Q. Rev. 481; Potter, D.C., *Soldiers Wills*, (1949) 12 Mod. L. Rev. 183.

[16] The *Army Act*, 1881 44-45 Vict. c. 58.

[17] *Re Booth*, [1926] P. 118 (as to soldiers) and *In Bonis M'Murdo*, [1867] 1 P & D 540 (as to sailors), *and see* Note by R. E. Meggary at 60 L.Q. Rev. 28 on *In b. Anderson*, [1943] 2 All E.R. 609 and *In b. Rippon*, [1943] p. 61.

[18] *See* T. Ellis Lewis, *Note on In Re Booth* (1926) 118 at (1926) 42 L.Q. Rev. 445; *Re Wingham*, [1948] 2 All E.R. 908 and the comment on this case by A.E. Megarry at 64 L.Q. Rev. 174.

[19] [1940] 1 W.W.R. 465 (Sask. Surr. Ct., Bryant Surr. Ct. J.).

The Governor General in Council originally placed the regular force component of the Canadian Forces on active service on September 9, 1950. This order was subsequently replaced by a new order in council in 1973 which is still in force today.[22] The Canadian Forces have therefore been on active service for thirty years. Consequently when a court is faced with a decision as to whether a member of the Canadian Forces was on active service at the time he executed his will, an argument may be made that the court no longer needs to turn to the old case law but need only refer to the *National Defence Act* and the fact that the forces have been placed on "active service" by order in council. There have, unfortunately, been no reported cases interpreting these words in the *Wills Act*.

The technique of cross-referencing the *Wills Act* to the *National Defence Act*, while it solves some difficult problems, potentially creates new ones which have not yet been fully explored. For example, the enabling section of the *National Defence Act* has two component parts. To paraphrase the section, the Canadian Forces may be placed on active service in an emergency defence of Canada, or pursuant to NATO or U.N. commitments.[23] Under this provision the present Order in Council has placed the Regular Force component of the Canadian Forces on active service anywhere in or beyond Canada only for NATO purposes.[24] In the event that an underage serviceman had made a privileged will while engaged in an activity not related to NATO purposes, it is open to question whether the will would be valid.

There have been numerous recent proposals to expand or redefine the meaning of the term "active service." In Australia it has been suggested that the definition should include prisoners of war and interned Australian nationals, as well as members of service industries supporting the conduct of the military operation.[25]

Other commentators have suggested following the example of civil law systems and making privileged wills valid for a limited period only.[26] For example, in France such wills are only provisional and a more formal will must be made within six months of the termination of the circumstances which justified the privilege. In Germany a privileged will automatically becomes invalid if the testator is alive three months after it was made. In England, the Latey Committee on the Age of Majority[27] took a different approach and considered the possibility of automatic revocation of wills on demobilization. A recent proposal has also been made to replace the concepts of "actual military service" and "active service" with a new term now used in the United Nations Charter: "use of force." Thus the privilege could be invoked if the testator was in an area in which the use of force is imminent.[28]

Rewording the act is not necessarily the best answer to the confusion surrounding the active service concept. As this review indicates, there is a lack of uniformity as to what constitutes "active service." The concept is needlessly complex and it would be difficult for a member of a military unit to be sure if the privilege applies to him.

(b) Determining membership in the Canadian Forces

A minor has capacity to make a will only while a member of the Canadian Forces placed on active service pursuant to the *National Defence Act*, a member of the naval, land or air force of any member of the British Commonwealth or ally of Canada while on active service. The term "Canadian Forces" is defined in the *National Defence Act* and is subdivided into component parts. These include a regular force, a Reserve Force and a Special Force.[29] A question can arise as to who qualifies for membership in a given force.

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[20] The *Wills Act*, S.Sask. 1931, c. 34, s. 5 (2).

[21] In 1930, the Manitoba Court drew a further distinction between "active forces" and "active service" in Canada. On interpretating a life insurance contract the Court concluded that a member of the air force or navy or militia could be in the "active force" without being in "active service." It decided that an air force officer who was fatally injured in a plane accident while engaged in the performance of his duty was not in the "active service of the militia" within the meaning of a life insurance policy, and thus only a reduced amount was payable on the policy. (*Toronto General Trust Corpn. v. Great West Life Assur. Co.*, [1930] 1 W.W.R. 881; [1930] 2 D.L.R. 770.

[22] R.S.C. 1970, c. N-4, s. 31.

[23] Order in Council P.C. 4365, September 9, 1950, and see Ontario Law Reform Commission, Report on the Proposed Adoption in Ontario of the Uniform Wills Act, (1968) at 28. This order was replaced by a new Order in Council P.C. 1973—364 (Nov. 1973) which placed the Canadian Forces on active service for NATO purposes.

[23] *National Defence Act*, R.S.C. 1970, c. N-4, s. 31 (1).

[24] Order in Council P.C. 1973-364.

[25] Law Reform Commission of Queensland Working Paper on a Bill to Consolidate and Amend the Law of Succession and the Administration of Estates.

[26] Miller, J.G., The Machinery of Succession, London, 1977 at 162. The author comments that there is "something to be said" for such a reform.

[27] 1967 Cmnd. 3342, para. 418.

[28] Cole, *supra* n. 15 at 673.

[29] *National Defence Act*, R.S.C. 1970, c. N-4, ss. 15 (1), 15 (3) and 16 (1).

Commonwealth courts have on occasion been faced with the problem of deciding who is a soldier or sailor within the Act. They have concluded that both a purser on a man of war,[30] as well as a navy surgeon injured and returning home on a ship as a passenger,[31] are sailors. A person employed in the military service of the East India Co.,[32] a nurse under contract to the War Office serving on a hospital ship,[33] and a member of the Australian Red Cross who became ill while serving with an army hospital,[34] have been held to be soldiers and entitled to the privilege. On the other hand, a member of the St. Johns' Ambulance Association was held not to be entitled to the privilege,[35] nor was a member of a crew of a merchant ship carrying military personnel and materiel requisitioned by the British Ministry of War Transport in World War II, who was captured and died in an internment camp in Japan.[36]

(c) Foreign armed services

The *Wills Act* provides that a minor has will making capacity if he is a member of the naval, land or air force of any member of the British Commonwealth of Nations, or an ally of Canada and is on active service.[37] It is potentially very difficult to ascertain the meaning of the term "active service" in relation to the forces of a foreign country. Whether a country is an "ally," is also a moot point.

3. Mariners and Seamen at Sea

The *Wills Act* provides that a mariner or a seaman at sea, or in the course of a voyage, may make a will in writing regardless of his age. English courts have been called upon to define the term "mariner" in order to ascertain exactly who is entitled to the privilege.[38]

There have, however, been no recent Canadian cases referring to infant mariners or seamen. In fact there has been very little discussion of the rationale for the continued existence of the privilege in this context. In Canada it has been suggested by one writer that the term "mariner" includes sea-going fishermen employed on fishing boats.[39] One argument that could be advanced for its continued existence in British Columbia is that it might permit a local underage fisherman to make a will prior to a fishing trip.[40] There are several arguments, however, that can be raised against retaining the exception:

(a) It is a provision which appears to have been little used.
(b) Ocean travel in the course of empoyment or as a method of intercontinental travel is no longer so frequent.
(c) The age at which a person has capacity to make a will has been recently lowered to 19, and thus reducing the need for the privilege is not so pressing.
(d) British Columbians work at many dangerous jobs. It is anomalous to single out one type of trade and give its underage members such an exception. Workers' Compensation Board statistics indicate that it is probably more dangerous to be a bush pilot, a logger, a sawmill employee or work in building demolition, than to work on a fishing boat.[41]

The most appropriate course of reform would seem to be to abolish the exception and treat all residents of British Columbia in the same fashion.

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[30] *In the Goods of Hayes*, (1839) 2 Curt. 338, 163 E.R. 431.

[31] *In the Goods of Saunders*, [1865] L.R. 1 P & D 16.

[32] *In the Goods of Donaldson*, (1840) 2 Curt. 386; 163 E.R. 448.

[33] *In the Estate of Stanley*, [1916] P. 192.

[34] *Re Lord*, [1946] V.L.R. 468.

[35] *In the Estate of Anderson*, [1916] P. 49. Although Bargrave Dean J. indicated that if the deceased had previously been at sea he might have ruled differently.

[36] *Re Bickley's Will*, (1949) 49 S.R.N.S. 94; 66 W.N. 14 (Australian).

[37] *Wills Act*, R.S.B.C. 1979, c. 434, s. 5 (1).

[38] *In the Goods of Hale*, [1915] 2 I.R. 362; *In the Goods of Parker*, (1859) 154 E.R. 1041; and *In the Goods of Wilson*, [1952] P. 52.

[39] This is the conclusion in Feeney, The Canadian Law of Wills: Probate, 71. The Newfoundland statute specifically provides for "fishermen." R.S.N. 1970, c. 401, s. 2 states in part, "Provided that any seaman or fisherman, being at sea, may dispose of his property in the same manner as he might have done before the passing of this Act."

[40] This conclusion is supported by the Shorter Oxford English Dictionary definition of mariner as "a sailor, seaman, or in law, any person employed on a ship".

[41] Workers' Compensation Board of British Columbia, 1979 Classification and Rate List (Figures are expressed in dollars charged per hundred dollars of payroll):

1. Flying Schools, Water Bombing, Crop Dusting	$14.00
2. Logging	8.80
3. Shingle mills	7.60
4. Farming, Dairy Farm, Haying	6.50
5. Bridge Construction	5.30
6. Stevedoring	5.00
7. Oil drilling	4.60
8. Sawmills	4.60
9. Fishing or fish collection, whaling	4.00